

EXHIBIT EEE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MCDONALD'S CORPORATION,)
Plaintiff,)
vs.) No.)
1:19-cv-06471)
VANDERBILT ATLANTIC) (DLI) (SLT)
HOLDINGS LLC,)
Defendant.)
-----)

REMOTE VIDEOTAPED DEPOSITION OF
THOMAS J. TENER
New York, New York
Tuesday, September 21, 2021

Reported By:
CATHI IRISH, RPR, CRR, CLVS

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September 21, 2021

10:00 a.m.

Remote videotaped deposition of
THOMAS J. TENER, with all participants
appearing via videoconference, before
Cathi Irish, a Registered Professional
Reporter, Certified Realtime Reporter,
and Notary Public of the State of
New York.

A P P E A R A N C E S:

PASHMA STEIN WALDER HAYDEN, P.C.

Attorneys for Plaintiff

2900 Westchester Avenue

Suite 204

Purchase, New York 10577

BY: BRENDAN M. WALSH, ESQ.

MEISTER SEELIG & FEIN LLP

Attorneys for Defendant

125 Park Avenue

7th Floor

New York, New York 10017

BY: HOWARD S. KOH, ESQ.

ALSO PRESENT:

Thomas Devine, videographer

Wallace Zaccagino, Veritext concierge

MICHAEL MEYER

STACY HOWARD

1
2 THE VIDEOGRAPHER: Good morning.
3 We are going on the record at
4 approximately 10:01 a.m. on September
5 21, 2021.

6 This is media unit 1 of the video
7 recorded deposition of Thomas J. Tener
8 taken by counsel for the plaintiff in
9 the matter of McDonald's Corp. v.
10 Vanderbilt Atlantic Holdings LLC filed
11 in the U.S. District Court for the
12 Eastern District of New York, Civil
13 Action Number 1:19-cv-06471
14 (DLI) (SLT).

15 This deposition is being held
16 online as a Zoom videoconference with
17 all parties appearing remotely.

18 My name is Thomas Devine from the
19 firm Veritext New York and I am the
20 videographer. The court reporter is
21 Cathi Irish also with Veritext
22 New York.

23 I am not authorized to administer
24 an oath. I am not related to any
25 party in this action, nor am I

1
2 financially interested in the outcome.

3 Counsel appearing remotely will
4 now please state their appearances and
5 affiliations for the record. If there
6 are any objections to proceeding,
7 please state them at the time of your
8 appearance beginning with the noticing
9 attorney. After the appearances are
10 noted, the court reporter will swear
11 in the witness and we may proceed.

12 MR. WALSH: Good morning.
13 Brendan Walsh with the law firm
14 Pashman Stein Walder Hayden P.C. on
15 behalf of plaintiff McDonald's
16 Corporation.

17 MR. KOH: Good morning, Howard
18 Koh, Meister Seelig & Fein
19 representing the defendant Vanderbilt
20 Atlantic Holdings LLC.

21 T H O M A S J. T E N E R, called
22 as a witness, having been duly sworn
23 by a Notary Public, was examined and
24 testified as follows:

25 ///

1

2 EXAMINATION

3 BY MR. WALSH:

4 Q. Good morning, Mr. Tener. How are
5 you today?

6 A. I'm well, sir.

7 Q. Thanks for coming today. So
8 you've just been sworn in by the court
9 reporter and although we're not in court,
10 you understand that you're under oath and
11 obligated to tell the truth; right?

12 A. I do.

13 Q. Okay. So there's a court
14 reporter here who is taking everything
15 down. I'm going to ask you questions
16 today. You will provide the answers. If
17 you don't understand a question for any
18 reason, please let me know. If you answer
19 I will assume you understood the question.

20 Please answer questions verbally
21 with words. The court reporter can't take
22 down any nods or hand signals. And
23 especially because we're taking the
24 deposition today remotely via Zoom, please
25 make sure you let me finish speaking

1 TENER

2 before you start speaking and I'll do the
3 same for you. It just gets very confusing
4 and complicated when everyone starts
5 talking at once because the court reporter
6 can't take it all down if we're speaking
7 at the same time. Does that sound all
8 right to you?

9 A. It does.

10 Q. So Vanderbilt's attorney may
11 object to some of my questions. You
12 should understand unless it involves
13 privilege or something I guess else that
14 would prevent you from answering the
15 question, you must still answer the
16 question notwithstanding the objection.
17 Do you understand?

18 A. I do.

19 Q. And if you need a break for any
20 reason today just let me know. The only
21 thing I ask is that we don't take a break
22 so long as there's a question pending. Do
23 you understand these instructions?

24 A. I do.

25 Q. Is there any reason such as

1 TENER

2 medication that would prevent you from
3 understanding my questions or giving
4 complete and accurate answers to my
5 questions today?

6 A. No, sir.

7 Q. Where are you taking the
8 deposition from today?

9 A. In my office at 551 Madison
10 Avenue, New York, New York 10022, Suite
11 301.

12 Q. And are you in the room alone
13 today?

14 A. I am.

15 Q. Okay. Can you describe the
16 screens that are in front of you right
17 now, like what are you looking at?

18 A. I am looking at a laptop in front
19 of me that is open only to Zoom meeting.
20 And there is a screen to my left which is
21 my desktop which is open to the Veritext
22 file share which is showing the folder is
23 empty.

24 Q. All right, great. Are you
25 represented by counsel today?

1 TENER

2 A. I am.

3 Q. And who is that?

4 A. Howard Koh.

5 Q. And when did you retain Mr. Koh?

6 A. I guess that's a misstatement. I
7 am not -- he represents the defendant. I
8 am a witness. I have not retained
9 counsel.

10 Q. Okay. So do you understand that
11 you may not have any private
12 communications or chats with anyone while
13 a question is pending?

14 A. Correct.

15 Q. Okay. And my office sent you two
16 binders containing all of the documents
17 that Vanderbilt produced to McDonald's
18 during phase one of discovery in this
19 case. Did you receive those binders?

20 A. I have them in front of me, yes.

21 Q. Okay. So that production spans
22 from Bates numbers VA 00001 to VA 002265.
23 It's not necessary that you look at those
24 right now but we wanted to make sure that
25 you had those in the event you need them.

1 TENER

2 I'll be showing you exhibits today through
3 Veritext's Exhibit Share platform but if
4 you want to look at a hard copy of the
5 documents, some of those documents I show
6 you today may be in that binder. I just
7 ask that if you are looking at documents,
8 you just let us know what you're looking
9 at just so since we're not all in the same
10 room. Did Vanderbilt's counsel request
11 that you have your entire work file for
12 this matter available to you today?

13 A. No, he did not.

14 Q. Okay. Do you have it available
15 to you today?

16 A. Yeah, I believe on the computer.
17 If you want me to log into it, I can get
18 to it.

19 Q. Not right now. I guess Howard
20 and I can deal with that at a later time.

21 MR. WALSH: So if we could just
22 mark VA 001059.

23 (Exhibit P66, document Bates
24 labeled VA 001059, marked for
25 identification.)

1 TENER

2 BY MR. WALSH:

3 Q. And Mr. Tener, this is -- it's
4 entitled Professional Qualifications. It
5 looks like a résumé of sorts that was
6 attached to your July 30, 2019 --

7 A. Can I stop you for a second, sir?
8 You faded out and my Internet connection
9 is now unstable which was not a problem
10 before.

11 VERITEXT CONCIERGE: And can you
12 please repeat that number for me?
13 It's VA 00 what?

14 MR. WALSH: 001059.

15 VERITEXT CONCIERGE: This will be
16 introduced as Exhibit P66.

17 MR. KOH: Mr. Tener, it should be
18 coming up on the screen.

19 BY MR. WALSH:

20 Q. You just need to refresh.

21 A. I'm concerned that I should try
22 to -- it's up.

23 Q. Okay. So this is -- it looks
24 like a résumé that was attached to your
25 July 30, 2019 report. Do you recognize

1 TENER

2 this?

3 A. I do, sir.

4 Q. So it says that you graduated
5 from the United States Merchant Marine
6 Academy with a BS in marine engineering
7 and mechanical engineering. When was
8 that?

9 A. 1986.

10 Q. And do you have any formal
11 education beyond that?

12 A. Only relative to my designation
13 as a member of the Appraisal Institute and
14 licensing as a certified general
15 appraiser.

16 Q. So how long have you been a
17 licensed appraiser?

18 A. I don't recall the first year but
19 I believe it was in the late '90s that I
20 first got my license.

21 Q. And what's been marked as P66
22 says that you were previously a licensed
23 engineer with I guess the U.S. Coast
24 Guard; is that right?

25 A. Yes, sir.

1 TENER

2 Q. That's inactive?

3 A. Yes.

4 Q. And how long has that been
5 inactive for?

6 A. Since the '90s. I did not sail
7 on my license long enough to maintain it
8 so after the initial licensing, the first
9 cycle, it would have gone inactive.

10 Q. What is a third assistant
11 engineer?

12 A. It's a designation as one of the
13 officers on board a ship to stand watch as
14 a third assistant engineer that would be
15 fourth in charge in the engine department
16 and it is a -- it requires an education
17 and formal testing of about a week-long
18 testing to pass.

19 Q. And this document also says that
20 you're a licensed real estate broker in
21 New York?

22 A. I am, sir.

23 Q. How long have you been a licensed
24 real estate broker?

25 A. For about -- since the early

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TENER

'90s.

Q. And you mentioned before that you're a member of the Appraisal Institute?

A. I am.

Q. What is the Appraisal Institute?

A. It's a professional organization made up of highly educated and designated professionals in the appraisal industry. Its goal is to promulgate the highest quality of appraisal services in the field and to promote a sense of faith in the quality of professionals that provide those services to the public.

Q. Is the Appraisal Institute an authoritative source for appraisal standards?

A. No. They do have -- they have recently issued a standards similar to the Uniform Standards of Professional Appraisal Practice. They have an ethics and standards for members of the Appraisal Institute but the Uniform Standards of Professional Appraisal Practice is the

1 TENER

2 standards that all appraisers in the
3 United States operate on.

4 Q. Is the Appraisal Institute the
5 organization that issues the MAI
6 designation?

7 A. Yes, sir.

8 Q. And when did you become an MAI
9 appraiser?

10 A. About seven years ago, sir.

11 Q. Approximately how many times have
12 you been qualified by a court to testify
13 as an expert in appraisal?

14 A. Court? I believe I have only
15 testified once in court. I have been
16 called to court another time to work on
17 mediation but it was not testimony and I
18 have been deposed for court proceedings
19 several times but I've only had to testify
20 once in court.

21 Q. Okay. And have you ever been
22 designated as an expert in an arbitration
23 hearing?

24 A. Yes, sir.

25 Q. About how many times?

1 TENER

2 A. Similar between five and 15
3 times. Not all of them have been
4 testimony. I've been designated in more
5 that have not yet been testified on.

6 Q. Approximately what percentage of
7 your work involves matters that require
8 testimony in some form?

9 A. Probably about 10 to 20 percent
10 but it's rising.

11 Q. Your résumé says that you served
12 as a neutral or party appraiser for ground
13 rent and fair market rent determinations.
14 Approximately how many times have you
15 served in that capacity?

16 A. As an arbitrator, a neutral --
17 no, in ground rent determinations as a
18 party appointed appraiser, I have -- in
19 ground rent determinations I have served
20 about five or six times that I can recall
21 but I'd have to look, it may be more.

22 Q. When you say five or six times,
23 are you referring to just as a party
24 appraiser or as either a party appraiser
25 or a neutral?

1 TENER

2 A. As a party appraiser. As a
3 neutral, it was not a ground rent
4 determination. It was an office building
5 valuation.

6 Q. So in the other matters where you
7 served as a party appraiser in a fair
8 market rent process, did you come across
9 the case 936 Second Avenue LP versus
10 Second Corporate Development Co.? It's a
11 New York Court of Appeals decision from
12 2008.

13 A. I'm familiar with that, sir.

14 Q. And what is your understanding of
15 that case in the rule and outset?

16 MR. KOH: Objection. You may
17 answer.

18 THE WITNESS: My understanding is
19 it set a precedent that can be
20 surmised as that which is not
21 specifically excluded would deem to be
22 included in a lease.

23 BY MR. WALSH:

24 Q. And what do you mean by that,
25 practically what does that mean to you?

1 TENER

2 A. Practically it means that the
3 specific wording of a lease is required to
4 exclude certain provisions. Whether they
5 were intended or not, you have to state it
6 within the four corners of the lease.

7 Q. And how does that rule impact
8 whether the encumbrance of a lease needs
9 to be considered in a fair market rent
10 determination?

11 MR. KOH: Objection. You may
12 answer.

13 THE WITNESS: Practically if it
14 does not state that the lease
15 encumbrance is excluded, then the
16 lease encumbrance should be
17 considered.

18 BY MR. WALSH:

19 Q. Understood. And is that a case
20 that you think all MAI appraisers working
21 in New York need to be aware of?

22 MR. KOH: Objection. Go ahead.

23 THE WITNESS: I don't know if all
24 MAIs should be aware of it. I think
25 those that are informed by counsel

1 TENER

2 would be aware of it.

3 BY MR. WALSH:

4 Q. And you're the managing member of
5 KTR real estate advisors; right?

6 A. I am one of two managing members,
7 yes.

8 Q. Who is the other?

9 A. Terence Tener.

10 Q. And he's your brother?

11 A. He is.

12 Q. When did you found KTR?

13 A. KTR Real Estate Advisors LLC was
14 founded in January of 2009. It is a
15 successor-in-interest of several firms
16 that existed prior to that. It stretches
17 back to 1989.

18 Q. And how many members does KTR
19 have?

20 A. Two.

21 Q. Just you and your brother?

22 A. Yes, sir.

23 Q. And how many appraisers currently
24 work at KTR? Just an estimate is all I
25 need.

1 TENER

2 A. About 20.

3 Q. And besides appraisal work, what
4 other type of real estate work does KTR
5 do?

6 A. Basically all the work that we
7 perform is valuation related. It could be
8 market studies, it could be best use
9 analyses. In some cases we've been asked
10 to opine on the value of mortgage
11 interests, partial interests in real
12 estate but it's primarily
13 valuation-related services.

14 Q. Would valuation-related services
15 include cost construction estimates?

16 A. Well, in a cost approach we will
17 derive cost estimates. Historically KTR
18 in a prior company had an engineering and
19 environmental and construction consulting
20 business that did provide cost estimates.

21 Q. Does KTR still do that?

22 A. Only in the realm of the
23 performing cost approaches.

24 Q. Okay. And that cost construction
25 estimation work, is that done for third

1 TENER

2 parties or only for valuations that KTR
3 itself is performing?

4 MR. KOH: Objection. Go ahead.

5 THE WITNESS: It's I believe it's
6 only performed for valuations that we
7 are performing. We've been asked to
8 do insurable values that require a
9 cost estimating that are only -- that
10 is the only purpose of the assignment.

11 BY MR. WALSH:

12 Q. Has KTR worked for the law firm
13 Wachtel Missry before this matter?

14 A. No, sir.

15 Q. So this was the first time you
16 that ever worked with Morris Missry?

17 A. As far as I recall, sir.

18 Q. Had KTR worked with Sam
19 Rottenberg or Tom Li before this matter?

20 A. We had appraised the subject
21 property in the year prior to this matter
22 for Sam and Tom Li's firm. I don't know
23 if we worked for him for any other
24 assignments. I know that the referral
25 came through one of my associates, Theresa

1 TENER

2 Nygard. I don't know if she's done any
3 work for them directly but I can check.

4 Q. But this was the first time that
5 you worked with Sam and Tom, and when I
6 say this, meaning your work for
7 840 Atlantic Avenue?

8 A. This combined with the appraisal
9 that was performed prior to it, yes, sir.

10 Q. So you view those as separate
11 assignments?

12 A. Yes, sir.

13 Q. And has KTR done work for
14 McDonald's before?

15 A. Yes.

16 Q. And when was that?

17 A. You know, I hadn't personally
18 done work for it. I recall that Terry
19 worked, Terry and Theresa Nygard worked on
20 an assignment in Times Square for
21 McDonald's. I've also been told many
22 years ago Terry worked on an assignment
23 for McDonald's, I believe in Queens, but I
24 also believe that we have done other work
25 for McDonald's that I am not aware of but

1 TENER

2 those two I can't tell you exactly. I
3 have heard conversations that we have
4 worked for them.

5 Q. So the document we were looking
6 at earlier that's been marked as P66, it
7 mentions that a prior firm that you led
8 provided engineering and construction
9 consultation on thousands of investment
10 grade properties annually. Is that the
11 work that we were discussing earlier?

12 A. It was, sir.

13 Q. And when was the last time you
14 provided engineering and construction
15 consultation services?

16 A. Would have been in 2008, although
17 I would have been the chief operating
18 officer at that point in time so I was not
19 personally performing.

20 Q. And if you can again just sort of
21 generally describe what those engineering
22 and consultation services that you did
23 consisted of.

24 A. Sure. They were primarily plan
25 and cost review services for proposed

1 TENER

2 construction where you review plans,
3 budgets, and other factors to allow a
4 construction lender to make a decision
5 about a construction loan. Once a
6 construction loan is approved and the
7 lending institution is funding the
8 construction, our -- we would provide site
9 observation reports and review progress on
10 reports and authorize progress payments on
11 behalf of the bank.

12 Q. And where was that construction
13 work geographically?

14 A. Geographic --

15 Q. Was it in the five boroughs?

16 A. Yes, sir.

17 Q. Okay. Did that include Brooklyn?

18 A. Yes, sir.

19 Q. And in your role as an appraiser,
20 do you occasionally retain firms to assist
21 with engineering and construction
22 services?

23 A. I do, sir.

24 Q. And how about construction cost
25 estimators?

1 TENER

2 A. Yes, sir.

3 Q. How regularly do you retain
4 construction cost estimators?

5 A. I've only retained one and
6 actually the contracts I've been assigned
7 on a current assignment, most of the time
8 counsel will retain those experts and I
9 will work with them so I believe my prior
10 statement is probably inaccurate. I've
11 never retained them. We have proposals
12 out for one presently but I have worked
13 with those types of experts where counsel
14 has retained them.

15 Q. So how regularly do you work with
16 construction cost estimators?

17 A. Whenever I am involved with land
18 residual techniques and it's a complex
19 assignment that requires the testimony of
20 an expert in those fields, that is when we
21 will consider whether it is worth the
22 economics to have that additional
23 expertise involved.

24 Q. So you said when it's a complex
25 assignment. What constitutes a complex

1 TENER

2 assignment?

3 A. Something where the construction
4 details or multi-story, multiple types of
5 uses, different types of below grade
6 design that are complex as part of the
7 assignment, oftentimes these involve
8 luxury mixed use developments of high-end
9 residential. I've worked on ones where we
10 weren't sure with what the design would be
11 and complex I guess is a -- can be vague
12 in this sense but it is along the lines of
13 anything that requires what I would
14 consider multi-story design and multiple
15 use, multipurpose uses.

16 Q. Have you ever worked with
17 construction cost estimators in simpler
18 matters that don't involve multi-story
19 design?

20 A. None that I recall.

21 Q. You mentioned earlier that
22 Theresa Nygard from your firm was
23 contacted about this matter first; is that
24 right?

25 A. That's my recollection that she

1 TENER

2 was on the initial e-mails that referred
3 Mr. Rottenberg.

4 MR. WALSH: If we could please
5 pull up P19.

6 VERITEXT CONCIERGE: Copying over
7 P19 in our exhibit folder and it
8 should be in there now.

9 BY MR. WALSH:

10 Q. If you could please pull up
11 what's been previously marked as P19.

12 A. Yes, sir.

13 Q. So this is an e-mail that you
14 sent to Sam Rottenberg with a copy to
15 Shaun Kest and Theresa Nygard, both of
16 whom work at your firm, on June 7, 2018.
17 Do you see it?

18 A. I do, sir.

19 Q. And in the second paragraph, you
20 wrote, "Although the site is encumbered by
21 a ground lease dated November 30, 2017,
22 you have informed Theresa that the ground
23 lease is between related entities and you
24 would like an appraisal of the fee simple
25 interest in the site without consideration

1 TENER

2 of the ground lease."

3 Do you see that?

4 A. I do, sir.

5 Q. What did Theresa specifically
6 tell you about that conversation?

7 A. I think that's the extent of it,
8 sir.

9 Q. So you don't recall her giving
10 you any other information about the
11 November 30, 2017 ground lease?

12 A. I don't even recall the
13 conversation other than this reference in
14 the e-mail.

15 Q. And Theresa told you that she had
16 been told that the lease with McDonald's
17 would be expiring in the near term; is
18 that right?

19 A. I guess so. That's what I stated
20 so it must have been told to me.

21 Q. So going back to the November 30,
22 2017 ground lease, you use the phrase
23 related parties. How do you define the
24 phrase related parties in the context of
25 the ground lease?

1 TENER

2 A. I don't think the context of a
3 ground lease matters. It's related
4 parties is someone that shares ownership
5 interest in some fashion.

6 Q. And are there any sort of minimum
7 characteristics that need to be present in
8 order for you to consider something
9 between related parties?

10 A. Can you explain the question?

11 Q. I guess you said overlapping --
12 you said the shares of ownership interest.
13 Is there sort of a threshold percentage or
14 is there any percentage of shared
15 ownership?

16 A. I have never considered the fine
17 tuning of that point. I think any
18 ownership interest would be something that
19 you would consider a related entity.

20 Q. Now, could you imagine a spectrum
21 of relationships where there may be some
22 overlapping interest but it wouldn't
23 really impact the valuation, whereas if
24 there was a hundred percent overlap in
25 another relationship, that may impact a

1 TENER

2 valuation?

3 MR. KOH: Objection. Go ahead
4 and answer.

5 THE WITNESS: I think that there
6 could be partial ownership related
7 entities that would not impact it but
8 you need to -- you would want to
9 investigate it.

10 BY MR. WALSH:

11 Q. Moving down to the third
12 paragraph of P19, it looks like you
13 understood the assignment to include three
14 separate parts. First, an appraisal of
15 the site based on current zoning; right?

16 A. Yes.

17 Q. Second, an appraisal under the
18 assumption that there would be a change in
19 zoning consistent with what was then being
20 considered as part of the pending M-Crown
21 rezoning district; right?

22 A. Can you repeat the question?

23 Q. Second, an appraisal under the
24 assumption that there would be a change in
25 zoning consistent with the pending M-Crown

1 TENER

2 rezoning district; is that right?

3 A. I don't know if I knew the
4 M-Crown at that point in time but that
5 there was a pending zoning change. We
6 investigated that during the process but I
7 don't know if it was known at that time.

8 Q. Okay. And then third, you
9 understood them to be asking for a
10 valuation of the appropriate market ground
11 rent for the property and this is a quote,
12 "based on typical ground lease provisions
13 in New York City"; is that right?

14 A. It says that but I don't recall
15 us doing that in the first assignment.

16 Q. Okay.

17 A. I would have to look at -- my
18 memory is it doesn't remember that right
19 now.

20 MR. WALSH: And if we could mark
21 VA 017901.

22 VERITEXT CONCIERGE: Did you say
23 017901?

24 MR. WALSH: Yes.

25 VERITEXT CONCIERGE: I don't have

1 TENER

2 that exhibit in here.

3 MR. WALSH: Okay, let me move it
4 over. Give me one second. I'm going
5 to have to come back to that.

6 BY MR. WALSH:

7 Q. Did Sam Rottenberg confirm that
8 your understanding was correct?

9 A. Which understanding, sir?

10 Q. Your understanding as you
11 described it to him in your June 7th
12 e-mail that we just looked.

13 A. I don't recall but the engagement
14 letter for the assignment specified what
15 the understanding was.

16 Q. Okay. And before you prepared
17 that engagement letter, do you recall if
18 you spoke with Sam?

19 A. I don't recall but -- I just
20 don't recall whether it was a telephone
21 conversation or not.

22 Q. Okay. And when you first spoke
23 with Sam, do you recall what specifically
24 you discussed?

25 A. No, sir.

1 TENER

2 Q. Do you remember if anyone was on
3 the phone with you and Sam when you first
4 spoke?

5 A. I don't recall, sir.

6 MR. WALSH: Okay. If we could
7 please pull up P20. This is the June
8 27, 2018 engagement letter.

9 VERITEXT CONCIERGE: That's being
10 copied over to the marked exhibit
11 folder and it should be in there now.

12 BY MR. WALSH:

13 Q. And if you flip to the signature
14 page, it looks like you and Tom Li signed
15 this. Who is Tom Li?

16 A. He works with Mr. Rottenberg. I
17 don't know what his position is.

18 Q. And did you work with him closely
19 throughout the work you've been doing with
20 Vanderbilt?

21 A. He's been on a lot of the e-mails
22 and a lot of the correspondence would have
23 been between himself and Shaun Kest, the
24 MAI that worked on the appraisals with
25 him.

1 TENER

2 Q. Between Tom Li and Sam
3 Rottenberg, who did you interface with the
4 most?

5 A. I think early on it was Tom Li.
6 I think since this has moved to the
7 current state of affairs, it was more
8 Mr. Rottenberg.

9 Q. So in first paragraph of that
10 June 27, 2018 letter, you once again say
11 that it's your "understanding that the
12 lease with McDonald's is expiring in the
13 near term. Furthermore, although the
14 subject property is encumbered by a
15 long-term ground lease dated November 30,
16 2017, the ground lease is reportedly
17 between related entities."

18 Do you see that?

19 A. I do, sir.

20 Q. What did you do to confirm that
21 these representations were accurate?

22 A. I do not recall what was done.
23 That would have been done by Shaun Kest.

24 Q. But you ultimately signed all of
25 the appraisal reports that were prepared

1 TENER

2 for Vanderbilt; right?

3 A. I did.

4 Q. And you're responsible for
5 completely the contents of those
6 appraisals; right?

7 A. I am, sir, but I don't do all the
8 work, I review them.

9 Q. So if you flip to the second page
10 of this engagement letter, about
11 three-quarters of the way down, you ask
12 for copies of any leases that encumber the
13 properties.

14 A. Yes, sir.

15 Q. Did Vanderbilt provide KTR with
16 either the McDonald's ground lease or the
17 Vanderbilt ground lease in 2018?

18 A. I don't know. If they did, it
19 would be in the files we shared with you.

20 Q. Okay. And so if they are not in
21 the files, can I assume that they were not
22 provided?

23 A. I believe so, I would have to ask
24 Shaun Kest but I would think that we've
25 given you everything we had. So I think

1 TENER

2 that would be a reasonable assumption.

3 Q. And you just can't recall whether
4 that information was provided or not?

5 A. No, sir.

6 Q. Would there be any sort of
7 notation somewhere in your file that the
8 information was provided or anything like
9 that?

10 A. It should be in the work file or
11 it should state in the appraisal if we
12 reviewed the lease that we considered.

13 Q. Okay. And if they are not in the
14 file, you would have just taken
15 Vanderbilt's representations on these
16 points as true?

17 A. It's possible that we would have.
18 Normally we will include assumptions and I
19 know some of the appraisals, these earlier
20 appraisals had extraordinary assumptions.

21 Q. So although the June 7th e-mail
22 that we looked at earlier talked about
23 some work on determining the terms of a
24 potential ground lease, this June 27, 2018
25 letter does not reference any work on

1 TENER

2 terms for a ground lease. Do you recall
3 why that was?

4 MR. KOH: Objection. Go ahead.

5 THE WITNESS: No, I don't recall.

6 BY MR. WALSH:

7 Q. And this letter says that you're
8 going to estimate the market value of the
9 fee simple interest in three things, the
10 M1-1 zoned portion of the site, this is on
11 page 1, the R6B portion of the site and
12 three, the entire site under the
13 assumption that the entire site is rezoned
14 based on a current proposals represented
15 in the M-Crown study. Do you see that?

16 A. I do, sir.

17 Q. What is M1-1 zoning?

18 A. It's a low-density industrial
19 zoning, manufacture.

20 Q. What types of things can be built
21 on it?

22 A. Retail, industrial, you would
23 have to go through the uses in zoning that
24 are specified.

25 Q. And how about R6B zoning?

1 TENER

2 A. It's primarily residential. Both
3 of which I believe have in addition to
4 both the M1 and the R6B in addition to the
5 uses that I mentioned include community
6 facility uses as well.

7 Q. And would you consider R6B a
8 low-density residential zoning?

9 A. It's moderate. I think I believe
10 it was -- is it 3.44? I have to look at
11 my notes.

12 Q. It's not necessary.

13 On the second page, second full
14 paragraph, you write, "It is understood
15 that the intended use of this report is to
16 assist Vanderbilt Atlantic Holdings LLC
17 with certain asset management related
18 decisions and analysis."

19 What does that mean?

20 MR. KOH: Objection. Go ahead.

21 THE WITNESS: The client wasn't
22 specific. They said they want it for
23 their internal use and to determine
24 investment analyses. That's as clear
25 as they were.

1 TENER

2 BY MR. WALSH:

3 Q. Okay. So was that their phrase
4 or was it your phrase?

5 A. It was a combination of how they
6 explained it and how I would traditionally
7 write a purpose for which may have been
8 described by them as needing it for their
9 own analysis of that property. It might
10 have been a slightly different wording but
11 that would be the generic term that we
12 would use for that.

13 Q. And the next paragraph down, last
14 sentence, it says, "The report will be
15 prepared subject to the attached basic
16 assumptions and limiting conditions." And
17 then the basic assumptions and limiting
18 conditions, the third bullet down is "The
19 property is appraised free and clear of
20 any or all liens or encumbrances unless
21 otherwise stated."

22 Do you see that?

23 A. Yes, sir.

24 Q. So what does that mean?

25 A. That is a standard basic

1 TENER

2 assumption that we don't appraise a
3 property subject to mortgage financing or
4 any other encumbrances unless we identify
5 them within the report. So the assumption
6 is that there are none unless they are
7 identified in the report.

8 Q. And so how were you instructed to
9 treat the McDonald's ground lease and the
10 November 30, 2017 Vanderbilt ground lease?

11 A. In the initial assignment, this
12 is -- this particular assignment, we were
13 under the -- I think we were informed that
14 the lease was either expiring or expired
15 and that we weren't considering that
16 lease. So we were appraising the fee
17 simple interest which would have been
18 unencumbered by any leases.

19 Q. Okay. If you could please pull
20 up P21. That should be available
21 momentarily.

22 VERITEXT CONCIERGE: Exhibit
23 Share is being a little slow. It's
24 loading in there now. Okay, P21 is
25 now loaded in marked exhibit folder.

1 TENER

2 THE WITNESS: Sorry, I lost my
3 connection. Here we go.

4 MR. WALSH: If you could turn to
5 the second page.

6 MR. KOH: I still don't have it
7 loaded yet. There we go, thank you.

8 THE WITNESS: I have it, sir.

9 MR. KOH: So do I.

10 VERITEXT CONCIERGE: Mr. Walsh,
11 we can't hear you.

12 MR. WALSH: Sorry about that. I
13 may have muted my headset. Can you
14 hear me now?

15 THE WITNESS: Yes.

16 BY MR. WALSH:

17 Q. So if you could look at the
18 August 9, 2018 e-mail at 11:34 from Tom
19 Tener to Sam Rottenberg, it's on the
20 second page there and you say, "Sam, Shaun
21 relayed to me the focus of his
22 conversation with you about this
23 assignment. He explained that you would
24 like us to include an analysis of the
25 likely terms of a ground lease (under the

1 TENER

2 existing zoning)." "

3 Did Sam or anyone else at
4 Vanderbilt explain to you why they now
5 wanted this work done even though it
6 wasn't included in the original retention
7 letter?

8 A. Not that I recall.

9 Q. By the time of this e-mail,
10 August 9, 2018, had KTR shared its
11 impression of the fee values of the
12 property with Vanderbilt even in just
13 preliminary form?

14 A. I don't recall.

15 Q. And if you look to the first page
16 of that e-mail, it looks like Vanderbilt
17 told you to assume it was a 99-year ground
18 lease. Do you see that?

19 A. It says it should be a 99-year
20 lease.

21 Q. Okay. So they told you to assume
22 it was a 99-year ground lease?

23 A. Looks like the question before
24 that suggests that Mr. Rottenberg had sent
25 a broker opinion showing a 25-year lease

1 TENER

2 without discounting it, so there was
3 obviously some confusion and we were
4 asking him to clarify.

5 Q. And why did you need
6 clarification about the term?

7 A. Just looking for facts of what
8 the -- what we would be valuing.

9 Q. So would the valuation, could
10 that depend on the term?

11 A. Yes, sir.

12 Q. And how could the term impact
13 value?

14 A. The -- anything over a 49-year
15 lease is treated as a taxable event in
16 terms of capital gains. It is roughly
17 equivalent to a sale of the property. I
18 can't speak to the specifics of how it
19 would impact the value but there are
20 certainly factors that need to be
21 considered in terms of control of the
22 asset.

23 MR. WALSH: Okay. Let's see if
24 we can pull up. Just bear with me one
25 second.

1 TENER

2 I'm sorry, can we just take a
3 five-minute break? I'm having some
4 problems here with the documents. I
5 just need to get it squared away.

6 MR. KOH: Okay, should we come
7 back at 11 o'clock?

8 MR. WALSH: Why don't we say 11
9 o'clock. I'll just try to get this
10 squared away. It's just my documents
11 are giving me a little bit of a
12 problem right now.

13 MR. KOH: Okay.

14 MR. WALSH: Thanks so much.

15 THE VIDEOGRAPHER: The time is
16 10:51. We're going off the record.

17 (Recess taken from 10:51 a.m. to
18 11:00 a.m.)

19 THE VIDEOGRAPHER: The time is
20 approximately 11 a.m. We're back on
21 the record. This is the beginning of
22 media 2.

23 MR. WALSH: If we could mark what
24 bears the Bates stamp VA 023239.

25 VERITEXT CONCIERGE: This will be

1 TENER

2 introduced as P67 and it should be in
3 there now.

4 (Exhibit P67, document Bates
5 labeled VA 023239, marked for
6 identification.)

7 BY MR. WALSH:

8 Q. Mr. Tener, if you could please
9 pull up P67, it's an e-mail chain between
10 Vanderbilt and KTR from August 2018. And
11 I'd like to direct you to the second page
12 of that e-mail, and again number 240, it
13 looks like an August 9, 2018 e-mail from
14 Tom Li to you and Shaun Kest and it's a
15 discussion of comps.

16 Do you see that?

17 A. Yes, sir.

18 Q. So he sent you some comps that
19 they had found and then I guess Shaun
20 subsequently provided some of the comps
21 that KTR was looking at. In that August
22 9, 2018 e-mail, Tom Li wrote, "The two
23 M1-1 sites are much higher \$/zsf than the
24 2 FAR sites."

25 What did you understand that to

1 TENER

2 mean?

3 MR. KOH: Objection. Go ahead.

4 THE WITNESS: That M1-1 sites
5 with a 1 FAR trade at a higher price
6 per square foot buildable area than do
7 the 2 FAR sites.

8 BY MR. WALSH:

9 Q. And what do you mean the 2 FAR
10 sites?

11 A. An M1-2 site and an M2-1 I
12 believe are 2 FAR sites. In other words,
13 it could be built twice the floor area of
14 the site, the floor area ratio. M1 sites
15 which can only be built to a single
16 multiple of the lot area when analyzed on
17 price per square foot of zoning floor area
18 tend to trade at higher prices per square
19 foot than do those with multiple FARs for
20 M zone sites.

21 Q. Got it. And then in the next
22 sentence you wrote, "And for all the
23 M2-1/M1-2 sites around Gowanus, almost
24 none will be developed at 2.0 commercial."

25 What do you understand that to

1 TENER

2 mean?

3 MR. KOH: Objection. Go ahead.

4 THE WITNESS: It means that Tom
5 Li was under the impression that they
6 were not going to be built to anything
7 more than a 1 FAR or wouldn't be built
8 to fully 2 FAR, that they were being
9 purchased for a development of
10 somewhat less than that. I'm not sure
11 what his rationale was for that, if he
12 looked up filed building plans or how
13 Shaun followed up or if he didn't use
14 them.

15 BY MR. WALSH:

16 Q. And could he have been indicating
17 that they were going to be developed at a
18 higher density?

19 A. No, sir.

20 Q. Why is that?

21 A. The only way, I think he was
22 trying to say is they would not be
23 developed to the maximum which would be 2.
24 The only way it would go beyond 2 is if
25 they were zoning development agreements

1 TENER

2 that acquired development sites or excess
3 development rights from potential sites
4 around them. I don't believe that was the
5 context of his communication.

6 Q. Are you aware of a rezoning
7 proposal that was happening around
8 Gowanus?

9 MR. KOH: Objection. Go ahead.

10 THE WITNESS: As I sit here, I'm
11 not sure which zoning analysis or
12 zoning change you're referring to.

13 BY MR. WALSH:

14 Q. Okay. So I guess just a general
15 question, if you come across information
16 that a property is being bought with the
17 goal of redevelopment at a higher zoning,
18 how would that -- then the property you're
19 valuing, how would that information factor
20 into your valuation analysis?

21 MR. KOH: Objection. Go ahead.

22 THE WITNESS: I'm going to need
23 that clarified.

24 BY MR. WALSH:

25 Q. So for example, if someone is

1 TENER

2 buying an M1-1 site but intends to file a
3 private rezoning application and build
4 high density residential on it instead of
5 M1-1, would that be information that's
6 relevant to whether or not you use that
7 specific property as a comp in your
8 analysis?

9 A. The potential for it being
10 rezoned or go through the process to get a
11 variance should be considered and if the
12 end use is inconsistent with your end use,
13 you would have to determine whether those
14 factors influence the price that was paid.

15 Q. Okay. And you can't remember
16 what information Vanderbilt gave to you
17 about the McDonald's lease, is that right,
18 other than that it was expiring in the
19 near term?

20 A. I don't recall information they
21 shared with us.

22 Q. If we could please pull up P22,
23 this is your August 30, 2018 appraisal
24 report.

25 VERITEXT CONCIERGE: P22 has been

1 TENER

2 moved into the marked exhibit folder.

3 BY MR. WALSH:

4 Q. If you can just tell me when you
5 have that opened up.

6 A. It's open, sir.

7 Q. This is the appraisal report KTR
8 issued to Vanderbilt on August 30, 2018;
9 right?

10 A. Yes, sir.

11 Q. And it's addressed to Sam
12 Rottenberg at Vanderbilt?

13 A. It is.

14 Q. And both you and Shaun Kest
15 signed this report; right?

16 A. Yes, sir.

17 Q. On page 2 it says you valued the
18 fee simple interest of the property at
19 current zoning at 18.3 million; right?

20 A. Yes, sir.

21 Q. And you valued the fee simple
22 interest of the property under the
23 hypothetical condition that the entire
24 site is rezoned in accordance with the
25 M-Crown study at 38.8 million; right?

1 TENER

2 A. Yes, sir.

3 Q. And both valuations were
4 determined assuming that the property was
5 free and clear of the encumbrance of any
6 lease including the McDonald's lease;
7 right?

8 A. Yes, that's the fee simple, sir.

9 Q. Why was there such a large
10 difference in the valuations under the two
11 zoning scenarios?

12 A. That would be detailed within the
13 report but there is a significantly higher
14 density and different use under the
15 proposed M-Crown for the subject site.

16 Q. So in other words, a lot more
17 could be built on the property under the
18 M-Crown proposal than the current zoning
19 allowed?

20 A. It would be a higher density more
21 buildable area and less restrictions on
22 the uses.

23 Q. And that impacts the value;
24 right, makes it more valuable?

25 A. Yes, sir.

1 TENER

2 Q. Okay. If you could flip to the
3 page ending in 09. Paragraph 1 under
4 Extraordinary Assumptions. Second
5 sentence, or third sentence, KTR --

6 A. I'm not sure where you are, sir.
7 Are you on Extraordinary Assumptions page
8 B?

9 Q. Correct, the first numbered
10 bullet, it says, "The subject property is
11 improved with a McDonald's restaurant."

12 A. Yes, sir.

13 Q. Third sentence, it says, "KTR
14 requested a copy of the McDonald's lease
15 but was not provided with a copy."

16 Does this refresh your
17 recollection at all about why Vanderbilt
18 didn't give you a copy of the McDonald's
19 lease at this time?

20 A. I'm not sure why they didn't give
21 me a copy. You would have to ask
22 Vanderbilt but they did not. We uncovered
23 a memorandum of lease. I believe we
24 shared that with them. That memorandum
25 said that they had exercised their option

1 TENER

2 which was inconsistent I believe with what
3 we had been communicated by the client
4 prior. In order to be clear and not
5 communicate a misleading result, we
6 included this extraordinary assumption.

7 Q. And do you recall having any
8 conversations with Vanderbilt about that
9 conflicting information?

10 A. I don't recall whether it was
11 myself or Shaun but we definitely -- there
12 was definitely some communication and I
13 don't know whether it was telephone or
14 e-mail.

15 Q. And did they give any explanation
16 for the conflicting information?

17 A. I don't believe so at that time.

18 Q. And how about at a later time?

19 A. Later when we were engaged for
20 the -- by Wachtel Missry or when we
21 interviewed with Wachtel Missry to be
22 engaged, the purpose of the next
23 assignment which you're involved in now
24 was explained to KTR.

25 Q. But they never explained why they

1 TENER

2 gave you incorrect information in 2018?

3 MR. KOH: Objection. Go ahead.

4 THE WITNESS: As I said, they
5 never explained why this was withheld
6 or why they -- why the information
7 about the renewal -- the exercise
8 renewal was withheld from us.

9 BY MR. WALSH:

10 Q. Okay. The next paragraph down,
11 it talks about the Vanderbilt lease dated
12 November 30, 2017. About halfway down you
13 wrote, "According to the client, this
14 ground lease is between related parties."

15 Did you believe that to be
16 accurate at the time?

17 A. The only information I had was
18 what was told to us and we had no way of
19 confirming that it was not accurate or was
20 accurate.

21 Q. And you use the land sales
22 comparison approach to value the fee
23 simple interest of the property under both
24 scenarios; right?

25 A. Sales comparison approach.

1 TENER

2 Q. Sales comparison approach. And
3 why did you use that approach?

4 A. That was appropriate to the scope
5 of work.

6 Q. Which was to value the fee simple
7 interests of the land; correct?

8 A. It was the fee simple interest
9 in -- let me make sure, in the property, I
10 believe. Subject site. I'm not quite
11 sure whether we took off demolition or
12 not. I would have to check but that would
13 be the only difference, whether it was the
14 value of the property or the value of the
15 land, underlying land.

16 Q. Do you recall if Vanderbilt asked
17 you specifically to use that approach?

18 A. No, I don't believe they did. I
19 believe we just determined it based on the
20 scope of work.

21 Q. Okay. If you could turn to the
22 page ending in 082, it is page 69 of that
23 report. It's called Ground Rent Analysis.

24 A. You said page 82 of the pdf?

25 Q. It's -- the Bates number on the

1 TENER

2 bottom is 082 but it's page 69 of the
3 report.

4 A. It's not coming up. It's
5 refreshing. I'm sorry, nothing is coming
6 up.

7 MR. KOH: It's taking awhile to
8 load on my end, too.

9 BY MR. WALSH:

10 Q. Actually, you've got a physical
11 copy in that binder, the binders that I
12 sent. It will be in the first binder.
13 It's ending in 082. I believe they are
14 double-sided to save paper.

15 A. It came up.

16 Q. Okay.

17 A. So page?

18 Q. So it's page 69 and page 70. It
19 looks like a two-page analysis for ground
20 rent.

21 Do you see that?

22 A. At page 70 where it says M-Crown
23 rezoning. Tell me again what.

24 Q. It's page 69 and it's the Bates
25 stamp ending in 082. It may actually just

1 TENER

2 be simpler to look at the hard copy.

3 A. I'm getting there. It's just I
4 had the wrong 69. The ground rent
5 analysis, I have it, sir.

6 Q. What was KTR attempting to do in
7 the analysis that's reflected on these two
8 pages?

9 A. Do you mind if I read it?

10 Q. Of course, no, go ahead.

11 A. (Witness perusing document.)

12 Looks like we were trying to
13 provide them with an understanding of what
14 a ground rent multiplier would be based on
15 these two land determinations, the land
16 value determinations back in 2018.

17 Q. And that was with a hypothetical
18 99-year term; right?

19 A. I don't recall what term.

20 Q. If you look at the top of page
21 70, the second page.

22 A. Typically they are from 50 to 99
23 based on discussion -- a 99-year term is
24 anticipated, yes.

25 Q. And how did KTR perform its

1 TENER

2 valuation of the potential ground rent
3 because at the bottom of the second page
4 of this analysis you arrive at a market
5 rental value of the subject land of
6 \$1,098,000 per year.

7 A. Based on what I'm reading, we
8 concluded that a rent multiplier based on
9 this, it concluded 18 million three would
10 be 6 percent at the initial ground rent
11 with steps based on flat rent for 20 to 25
12 years and rent resets at a percentage of
13 land value thereafter.

14 Q. Now, why didn't KTR value the
15 property using comparable ground leases
16 instead?

17 A. That scenario? I don't know why
18 we did not at that point in time but I
19 believe the -- this seemed to be the
20 easiest way to get a significant amount of
21 data where we already had the value of the
22 land determined.

23 Q. Well, wouldn't ground leases,
24 comparable ground leases provide a more
25 accurate valuation?

1 TENER

2 A. If you had current ground leases
3 that reflected similar uses, that would be
4 certainly a viable approach. I don't
5 believe we had current relevant ground
6 leases but I don't want to speculate.

7 Q. Well, at the very top of page 69,
8 second sentence, it says, "For the
9 purposes of this analysis KTR reviewed
10 several ground leases and ground rent
11 resets throughout Manhattan and the outer
12 boroughs."

13 So it looks like you actually did
14 have ground leases though; right?

15 A. But they were not current. They
16 were over many periods of time with
17 different ground rent resets. We provided
18 those, too.

19 Q. And if those leases weren't
20 current, how could you then use that data
21 in 2018 to convert the land value to an
22 accurate ground rent value?

23 A. Because of the inclusion of these
24 fair market rent resets within them that
25 is based on rent multipliers, what we were

1 TENER

2 looking for was a market indication of
3 what rent multipliers should be used for
4 different property types.

5 Q. And that doesn't change over
6 time?

7 A. It -- I believe it can but if you
8 look at the data, it doesn't seem to show
9 significant changes.

10 Q. Are you familiar with the book
11 The Appraisal of Real Estate that the
12 Appraisal Institute publishes?

13 A. Yes.

14 MR. WALSH: If we can pull up
15 what I've called ARE 1 and mark that
16 as an exhibit.

17 (Exhibit P68, document entitled
18 The Appraisal of Real Estate, marked
19 for identification.)

20 VERITEXT CONCIERGE: This will be
21 marked as Exhibit P68.

22 BY MR. WALSH:

23 Q. So Mr. Tener, this is an excerpt
24 from the 14th edition of The Appraisal of
25 Real Estate book published by the

1 TENER

2 Appraisal Institute. You said you're
3 familiar with it?

4 A. I am. I have the 15th edition
5 but I'm familiar with it.

6 Q. And I believe the 14th edition
7 was the most current version as of the
8 time of this appraisal; right?

9 A. I don't know. I'd have to look
10 at when 15 came out.

11 Q. And do you consider this an
12 authoritative text for appraisers?

13 A. It certainly referenced and
14 influences. I'm not sure I would say
15 authoritative.

16 Q. But the Appraisal Institute, they
17 are the ones that issue the MAI
18 designation; right?

19 A. They are, sir.

20 Q. So you would certainly take what
21 they say seriously; right?

22 A. Yes, sir.

23 Q. So if you could at page 466,
24 third page of the pdf, first full
25 paragraph, it says, "When a market rent

1 TENER

2 estimate for the subject property is
3 required, the appraiser gathers, compares
4 and adjusts comparable rent data."

5 Do you see that?

6 A. Yes.

7 Q. So what did you do in August 2018
8 to try to gather, compare and adjust
9 comparable rent data?

10 A. What I did is I identified the
11 two factors that set rent for a ground
12 lease, the first of which was the land
13 value, gathered, adjusted and concluded to
14 the land value. I analyzed the rent
15 multipliers for different types of assets
16 depending on what they were intended to be
17 developed to. I considered them, analyzed
18 them and concluded to an appropriate rent
19 multiplier which is a component of the
20 ground rent under this approach to
21 determine market value.

22 Q. So I understand what you did but
23 I guess my question was what did you do in
24 August 2018 to try to gather, compare and
25 adjust comparable rent data?

1 TENER

2 A. I just explained it to you. I
3 gathered the component of the rent data --
4 the component of the rent data that I
5 analyzed that required analysis was
6 twofold. One was the land value, two was
7 the rent multiplier, both of which were
8 gathered, analyzed, adjusted and
9 concluded. They are components of the
10 rent determination as such.

11 Q. But you didn't gather or compare
12 and adjust comparable ground leases;
13 right?

14 A. No.

15 MR. KOH: Objection.

16 THE WITNESS: No, I did not. I
17 analyzed components of it. It's not
18 a -- it is not a -- there's not only
19 one method of performing this
20 analysis.

21 BY MR. WALSH:

22 Q. Okay. So the next sentence in
23 that same page we were just looking at
24 says the parties to each lease should be
25 identified to ensure that the party held

1 TENER

2 responsible for payment is actually a
3 party to the lease. It then goes on to
4 talk about leases.

5 So your testimony is that the
6 Appraisal Institute is not contemplating
7 that an appraiser would gather, compare
8 and adjust comparable leases?

9 MR. KOH: Objection. Go ahead.

10 THE WITNESS: That's not my
11 testimony. This is a generic
12 paragraph about market rent largely
13 dealing with improved assets and they
14 are advising methodology that you
15 should use to determine that you don't
16 use comparables that are not arm's
17 length, that are impacted by other
18 factors. You're taking a generic
19 paragraph and applying it to a
20 specific task. That is not what
21 appraisers do. They don't take
22 generic. They work within the data
23 and the appraisal problem presented.

24 BY MR. WALSH:

25 Q. Well, there were certainly

1 TENER

2 comparable 99-year ground leases that you
3 could have used for this analysis; right?

4 A. None that occurred within five
5 years of the subject matter that I was
6 aware of.

7 Q. What did you do to look for them
8 because I've looked through your file and
9 I haven't seen any indication at all that
10 you searched for comparable ground leases.
11 What did you do?

12 A. Well, initially I searched for
13 ground leases using CoStar that occurred
14 within a period of time, was not able to
15 find any, but since there was no result it
16 wouldn't be in my file. I also know that
17 Shaun initially did the same thing or
18 either one of us that I can't remember.
19 But I know that we searched for ground
20 leases. There's an option within the
21 transactions to discuss lease, that it's a
22 lease transaction rather than a sale.

23 Q. Okay, going back to the 14th
24 edition of The Appraisal of Real Estate,
25 that same page, the second full paragraph

1 TENER

2 about halfway down on the right-hand side,
3 it says, "Recent leases for the subject
4 property may be a good indication of
5 market rent."

6 Do you see that?

7 A. Yes, sir.

8 Q. But Vanderbilt did not provide
9 you a copy of its ground lease dated
10 November 30, 2017; right?

11 A. I don't think so. I don't recall
12 but I don't think so. I think based on
13 what we said we didn't have it at that
14 time.

15 Q. Do you know if you've ever seen
16 it?

17 A. I don't recall ever seeing it.

18 MR. WALSH: If we could pull up
19 what's been marked as P4.

20 VERITEXT CONCIERGE: P4 has been
21 copied over.

22 BY MR. WALSH:

23 Q. So this is the Vanderbilt lease
24 dated November 30, 2017. And if you could
25 turn to -- it's the page 20 of the lease,

1 TENER

2 section 3. It's entitled Rent. It's the
3 page ending with the Bates stamp 128.

4 A. It's loading. I have it.

5 Q. So this is the first time you're
6 ever seeing this document; right?

7 A. I don't recall. If I have it, it
8 would be in my files.

9 Q. And if it's not in your files, it
10 means you don't have it; right?

11 A. Yes, sir.

12 Q. Okay. By the way, are ground
13 leases between related parties usually
14 this long?

15 MR. KOH: Objection.

16 THE WITNESS: I am not aware of
17 any ground leases between related
18 parties. I reviewed the lease.

19 BY MR. WALSH:

20 Q. So section 3.1, this is the rent
21 provision lease. It provides that so long
22 as McDonald's remains on the property,
23 which it has the right to do until 2039,
24 the rent Vanderbilt must pay to MMB
25 Associates is exactly equal to the rent

1 TENER

2 that McDonald's pays to Vanderbilt under
3 the McDonald's lease. In other words,
4 it's a complete pass through of rent from
5 McDonald's to MMB Associates. Vanderbilt
6 doesn't get to keep any of it. Were you
7 aware of that fact before today?

8 A. Where were you reading this?

9 Q. I'm summarizing what 3.1 says.

10 MR. KOH: I'm going to object.

11 Go ahead and answer.

12 BY MR. WALSH:

13 Q. Where it says there shall be a
14 direct pass through of the base rent and
15 all other charges.

16 A. Yes, sir. What is the question?

17 Q. So were you aware of the fact,
18 that fact today that Vanderbilt actually
19 doesn't get to keep any of the rent that
20 McDonald's pays?

21 A. No, sir.

22 Q. And the next couple of sections
23 talk about what happens once McDonald's
24 terminates its lease. And so in section
25 3.1.1 it talks about if McDonald's leaves

1 TENER

2 the property and the property has not been
3 rezoned. And if McDonald's leaves and the
4 property has not been rezoned, it's the
5 same zoning as when you were looking at
6 it, McDonald's would pay to MMB Associates
7 rent in the amount of \$10 per buildable
8 square foot per year. Do you recall what
9 the amount of buildable square footage was
10 at the time of your August 30, 2018
11 appraisal, was it 36,000?

12 A. I would have to look.

13 Q. I'll tell you at page -- it's the
14 page ending in VA 35. It says it's
15 36,000.

16 A. I'm sure it's in my appraisal as
17 well.

18 Q. So at \$10 per square foot, that
19 would mean that if McDonald's left, and
20 the property has not been rezoned,
21 Vanderbilt would pay MMB Associates
22 \$360,000 a year in rent. How would that
23 information have impacted your August 30,
24 2018 analysis if you had had it?

25 MR. KOH: Objection. Go ahead.

1 TENER

2 THE WITNESS: I would have
3 analyzed it in the rent history. I
4 can't tell you what my conclusion
5 would be because I have not read this
6 entire lease, but this sounds like a
7 provision where the two parties were
8 entered trying to rezone this property
9 for redevelopment and it rewarded the
10 parties for success and sort of
11 punished them for lack of success in
12 rezoning, but it would have to be
13 analyzed.

14 BY MR. WALSH:

15 Q. Okay. But would you have liked
16 to know that information when were
17 conducting your analysis of ground rent?

18 MR. KOH: Objection.

19 THE WITNESS: In which --

20 BY MR. WALSH:

21 Q. In August 30, 2018 report.

22 A. I'm not sure if it mattered.
23 They were asking us to appraise the fee
24 simple interest which you are permitted to
25 do. This is a lease encumbrance that does

1 TENER

2 have economic terms. It would be -- I
3 would have had to analyze it within the
4 sales history and would have had to
5 reconcile and determine whether it was
6 market or not.

7 Q. And your valuation in August 30,
8 2018, was that the rent was almost --
9 annual rent would be almost 1.1 million a
10 year, that was your fair market valuation;
11 right?

12 A. I believe so.

13 Q. And this was \$360,000 a year, a
14 lot lower; right?

15 A. Yes, sir.

16 MR. KOH: Objection. It's lower.

17 THE WITNESS: Lower. Thank you.

18 BY MR. WALSH:

19 Q. And I guess again, can you
20 explain exactly what you would have done
21 with this information if you had had it at
22 the time?

23 MR. KOH: Objection.

24 THE WITNESS: I would have
25 interviewed the parties, I would have

1 TENER

2 analyzed the economics, tried to
3 understand the rationale and the
4 reasoning for these tranching call it
5 conditional rent provisions within it
6 and I would have looked at how the
7 rent, what the rent went up to. I
8 would have tried to understand the
9 non-arm's length nature of that lease
10 that was reported. There would have
11 been multiple considerations but I
12 would have to have read the entire --
13 or at least the pertinent parts of the
14 lease.

15 BY MR. WALSH:

16 Q. But you never got that chance
17 because Vanderbilt never gave you the
18 lease; right?

19 A. Yes, sir.

20 Q. Even though you asked for it?

21 A. Yes, sir.

22 Q. Can you think of any reasons why
23 they wouldn't have provided it to you?

24 MR. KOH: Objection.

25 THE WITNESS: I can't speculate,

1 TENER

2 sir.

3 BY MR. WALSH:

4 Q. Do you wish they had provided it
5 to you?

6 MR. KOH: Objection.

7 THE WITNESS: I have no thoughts
8 on that subject.

9 BY MR. WALSH:

10 Q. You don't have any thoughts?

11 A. At this point, I do not. What's
12 been done is done.

13 Q. Well, I'm asking you if you could
14 do it over again, wouldn't you have liked
15 to have had this information?

16 MR. KOH: Objection.

17 THE WITNESS: I asked for it, I
18 was not provided. All I can speak to
19 is that.

20 BY MR. WALSH:

21 Q. What I'm asking for is if you
22 would have liked to have had it at the
23 time. You can't answer that question?

24 MR. KOH: Same objection. He's
25 answered it twice now. You can answer

1 TENER

2 it again.

3 THE WITNESS: I asked for it. I
4 don't know if it would have -- if I
5 can tell you I wish that I would have
6 had it. I don't know if that was the
7 emotion.

8 BY MR. WALSH:

9 Q. And you say going back to your
10 August 2018 report, which has been marked
11 as P22, I'm back at the ground rent
12 analysis at page 69, about halfway down
13 the bottom paragraph, you say, "If not for
14 the potential appreciation in land value
15 that would result from the enactment of
16 the M-Crown zoning, the subject land would
17 likely command a ground rent of 4 percent
18 to 5 percent of the current land value."

19 Do you see that?

20 A. Yeah, it's loading.

21 Q. So again, you have a hard copy of
22 it. It may just be simpler for you to
23 look at the hard copy. It's ending in
24 082.

25 A. I've got it, sir.

1 TENER

2 Q. So at the bottom of the page
3 ending in 082 about halfway down that last
4 paragraph, it says, "If not for the
5 potential appreciation in land value that
6 would result from the enactment of the
7 M-Crown zoning, the subject land would
8 likely command a ground rent of 4 percent
9 to 5 percent of the current land value."

10 Do you see that?

11 A. Yes, sir.

12 Q. But because of the strong
13 likelihood of a rezoning consistent with
14 M-Crown, you determined that a rent of 6
15 percent of the fair market value would be
16 consistent with the market; right?

17 A. Yes, sir.

18 Q. Now, can you just briefly explain
19 why is that, because of what we discussed
20 earlier, that it allows for higher density
21 and so it had become more valuable?

22 A. The use changes under the M-Crown
23 to be more predominantly residential,
24 sliding the percentage rent multiplier
25 down. Under the first one it is largely

1 TENER

2 M1 which can be commercial, it can be
3 facility, with the RA which can be
4 residential and community facility. That
5 mixed use is more slid towards the
6 commercial retail. It is the higher or
7 predominant use in that development which
8 would have been a higher percentage of
9 land value based on my comparable
10 analysis.

11 Q. At the top of the next page, we
12 looked at this before, you said that
13 ground leases are typically long term
14 ranging between 50 and 99 years. The
15 leases that you looked at for purposes of
16 this analysis, were they all between 50
17 and 99 years?

18 A. I believe so.

19 Q. Would you have used a different
20 set of ground leases if you had been asked
21 to determine an appropriate rent for a
22 shorter period of time like 20 years?

23 A. Yeah. I'm not aware of any
24 comparables or any transactions of ground
25 leases of 20 years or even materially less

1 TENER

2 than 49 years, so I don't believe there
3 would be a -- based on our research, I
4 don't believe there would be a pool of
5 comparables to analyze.

6 Q. So you issued your report in
7 August 2018 and who did you speak with
8 about the report after you issued it?

9 A. I don't recall.

10 Q. You don't recall if you spoke
11 with Sam Rottenberg or Tom Li?

12 A. I remember having conversations
13 with them. Again, I don't recall.

14 Q. Do you recall what the reaction
15 was to your estimate of value?

16 A. No, sir.

17 MR. WALSH: If we could mark --
18 or not mark but pull up what's been
19 previously marked as P52.

20 VERITEXT CONCIERGE: P52 has been
21 copied over.

22 BY MR. WALSH:

23 Q. So this is --

24 A. I don't have it.

25 Q. Okay.

1 TENER

2 A. I have it now.

3 Q. So this is an e-mail exchange
4 between Shaun Kest and Tom Li in October
5 of 2018 so a little less than two months
6 after you issued the report. Were you
7 aware that Tom had reached out to Shaun in
8 October of 2018?

9 A. Yes, sir.

10 Q. And do you know why he reached
11 out and what they discussed?

12 A. I think that they gave him this
13 additional comparables to consider.

14 Q. And just to be clear, the
15 comparables that are behind this are from
16 August 2018, they were sent earlier.

17 MR. KOH: Objection.

18 BY MR. WALSH:

19 Q. I don't know if that changes your
20 recollection.

21 A. You know, my recollection is not
22 changing but what is the question?

23 Q. I'm trying to recall if you knew
24 why Tom and Shaun were speaking in October
25 of 2018 about two months after you issued

1 TENER

2 your report.

3 A. I believe that they wanted us to
4 consider other comparables. That was the
5 gist of the communication.

6 MR. WALSH: Okay, if we could
7 mark VA 000313.

8 (Exhibit P69, document Bates
9 labeled VA 000313, marked for
10 identification.)

11 VERITEXT CONCIERGE: This will be
12 introduced as Exhibit P69.
13 Introducing now.

14 BY MR. WALSH:

15 Q. So you can look at the hard copy.
16 This document spans from 313 to 357. It's
17 an e-mail from Tom Li to Shaun Kest with a
18 copy to Sam Rottenberg, January 9, 2019,
19 and Tom Li wrote, "Shaun, please see
20 attached McDonald's lease."

21 So do you recall why Tom sent KTR
22 the McDonald's lease in January of 2019?

23 MR. KOH: Objection.

24 THE WITNESS: I don't recall why.

25 MR. WALSH: If we can pull up

1 TENER

2 what's been previously marked as P55.

3 VERITEXT CONCIERGE: P55 has been
4 copied over.

5 BY MR. WALSH:

6 Q. So this is an e-mail chain. On
7 the first page there are e-mails -- an
8 e-mail dated January 9, 2019 from Shaun
9 Kest to Sam Rottenberg with a copy to you
10 and to Tom Li. Do you see that?

11 A. I do, sir.

12 Q. So this is a few hours after Tom
13 Li sent over the McDonald's lease and
14 Shaun wrote, "Based on our conversation
15 this morning, we can change the addressee
16 to Tom Li. We can update the report to
17 reflect the market value of the fee simple
18 interest in the subject property, as if
19 vacant, unencumbered and available for
20 development to its highest and best use.
21 Under this scope, we would not need the
22 extraordinary assumption. We would have
23 to state that the property is leased to
24 McDonald's and that this encumbrance is
25 not considered in the appraisal."

1 TENER

2 Does this refresh your
3 recollection about conversations you may
4 have had with Vanderbilt in January of
5 2019?

6 A. I'm not sure if it's the timing
7 but I recall a question about the need for
8 extraordinary assumptions. And I recall
9 speaking with Shaun about what we were
10 permitted to do in terms of when we're
11 engaged to do a fee simple and that --
12 it's not -- you're permitted to appraise a
13 fee simple even if it's encumbered by
14 leases. But I believe I recall telling
15 him similar to what was communicated in
16 this e-mail, that we would just disclose
17 that there was a lease and it wasn't
18 considered in the valuation of the fee
19 simple.

20 Q. But you had issued your report
21 months earlier. Do you know why you were
22 having these discussions more than four
23 months later?

24 MR. KOH: Objection.

25 THE WITNESS: I don't recall. I

1 TENER

2 think they were asking about the
3 extraordinary assumption. I don't
4 know if we were yet contacted about
5 the McDonald's rent reset yet. I
6 don't know when we had the meeting
7 with Wachtel Missry.

8 BY MR. WALSH:

9 Q. When you say they were asking
10 about the extraordinary assumption, is
11 that the paragraph we looked at earlier
12 that disclosed the existence of the
13 McDonald's lease?

14 A. It was all the extraordinary
15 assumptions. I don't know whether -- I
16 can't recall in detail but I believe there
17 was questions about why we needed
18 extraordinary assumptions.

19 Q. And do you recall why they wanted
20 to change the addressee from Sam
21 Rottenberg to Tom Li?

22 MR. KOH: Objection.

23 THE WITNESS: I don't recall.

24 BY MR. WALSH:

25 Q. And KTR ultimately issued a

1 TENER

2 revised version of the August 30, 2018
3 report; right?

4 A. I believe so, yes.

5 Q. And do you recall that they were
6 also asking for an update of that report?

7 A. I don't recall.

8 Q. I'm sorry, what did you say?

9 A. I don't recall.

10 MR. WALSH: Okay. If we could
11 pull up what's been marked as P56.

12 VERITEXT CONCIERGE: P56 has been
13 copied over.

14 BY MR. WALSH:

15 Q. It's an e-mail chain from January
16 2019 between Vanderbilt and KTR. The top
17 e-mail is an e-mail --

18 A. It doesn't -- now it is.

19 Q. The top e-mail is an e-mail from
20 Sam Rottenberg to Shaun Kest on January
21 16, 2019. He says, "Shaun, looking
22 forward to get the revisions tomorrow. We
23 would like to proceed on the full update,
24 based on the M-Crown and comp set
25 updates."

1 TENER

2 Does that refresh your
3 recollection about what type of update, if
4 any, Vanderbilt was looking for?

5 A. It states what it was. I don't
6 have a clear memory of these
7 communications but that period of time I
8 guess, they wanted us to look at those and
9 update our values considering the
10 additional set of comps that they helped
11 us or made us aware of.

12 Q. Understood.

13 MR. WALSH: And if we can pull up
14 what's been previously marked as P57,
15 this is the revised report dated
16 January 17, 2019.

17 VERITEXT CONCIERGE: P57 has been
18 moved over.

19 BY MR. WALSH:

20 Q. So this was not produced to us in
21 the first phase of discovery so you'll
22 just have an electronic copy of this
23 document. It's P57. And if I could
24 direct your attention, there's a cover
25 e-mail on top. I just want to talk about

1 TENER

2 the first page of this revised report
3 dated January 17, 2019. It's the page
4 ending in Bates stamp 847.

5 A. Okay.

6 Q. And so just so I'm clear, was
7 this a revision that KTR insisted on
8 issuing or was this a revision that
9 Vanderbilt requested?

10 A. I honestly don't recall.

11 Q. Because as best as I can tell,
12 the report is essentially identical to the
13 August 30, '18 report except for the
14 bottom of the first paragraph of that
15 letter beginning with "The scope of work
16 also includes an opinion of the market
17 ground rent for the subject property" and
18 then it talks about the McDonald's lease.
19 You don't recall why that language was
20 added?

21 A. I think we took it -- are one of
22 the extraordinary assumptions out as well?

23 Q. Looks like the ground lease for
24 Vanderbilt -- actually no. So the first
25 extraordinary assumption about McDonald's

1 TENER

2 and the McDonald's lease is out. So is
3 that the purpose of the change?

4 A. I think so. I think it was -- I
5 think it had to do with us seeing the
6 memorandum that was filed and them wanting
7 to remove that extraordinary assumption
8 and this is how I believe we handled it.

9 MR. WALSH: Okay. If we could
10 pull up what's been previously marked
11 as P58. It's a -- what appears to be
12 a proposed engagement letter from KTR
13 dated January 22, 2019.

14 VERITEXT CONCIERGE: P58 has been
15 copied over.

16 BY MR. WALSH:

17 Q. If you'd just pull that up and
18 let me know when you have it open.

19 A. Okay.

20 Q. All right. So it says as
21 requested KTR --

22 A. It's still buffering. All right.

23 Q. It says, "As requested, KTR Real
24 Estate Advisors LLC intends to prepare an
25 update of a prior KTR appraisal of the

1 TENER

2 above referenced properties." About
3 halfway down that paragraph, it says, "It
4 is our understanding that the lease with
5 McDonald's is expiring in the near term."

6 Do you see that?

7 A. Yes, sir.

8 Q. Now, had Vanderbilt not shared
9 with KTR that McDonald's had already
10 advised Vanderbilt by that time that it
11 would be exercising its option for the
12 first option period beginning in April
13 2019?

14 A. I don't recall.

15 Q. But it seems like you were under
16 the impression that it would be expiring
17 in the near term so I assume if they told
18 you that McDonald's had already exercised
19 its option term that would have been
20 reflected in this letter; right?

21 MR. KOH: Objection. Go ahead.

22 THE WITNESS: I don't know
23 what -- I can't tell you what I would
24 have written but it seems to imply
25 that I did not know at that time.

1 TENER

2 BY MR. WALSH:

3 Q. It certainly seems inconsistent;
4 right?

5 MR. KOH: Objection.

6 THE WITNESS: It seems that I did
7 not know at that time.

8 BY MR. WALSH:

9 Q. Okay. And at the bottom of that
10 first page, again it says, "No
11 consideration will be given to the impact
12 of the McDonald's lease or ground lease."

13 So they had asked you to once
14 again not consider the encumbrance of the
15 McDonald's lease or the Vanderbilt lease;
16 right?

17 A. I believe that they wanted the
18 fee simple without any consideration of
19 those leases.

20 Q. On page 2 you wrote, "It is
21 understood that the intended use of this
22 report is to assist Vanderbilt Atlantic
23 Holdings LLC with certain asset management
24 related decisions and analysis."

25 So had they just told you that

1 TENER

2 they kind of just wanted it for internal
3 purposes again without being specific?

4 A. Yes, sir.

5 MR. WALSH: If we can pull up
6 what's been marked as P24.

7 VERITEXT CONCIERGE: P24 has been
8 moved over.

9 BY MR. WALSH:

10 Q. By the way, before we get to P24,
11 did Vanderbilt ever proceed with the
12 update that you had proposed in that
13 January 22, 2019 letter?

14 A. I don't recall.

15 Q. So pulling up P24, this is an
16 engagement letter between Vanderbilt
17 Atlantic Holdings and Metropolitan
18 Valuation Services dated February 14,
19 2019. Did you know that Vanderbilt
20 retained Metropolitan Valuation Services
21 to perform a review of KTR's August 30,
22 2018 appraisal?

23 A. No, sir.

24 Q. So is this the first you're
25 learning of that?

1 TENER

2 A. Yes, sir.

3 Q. Did you know that Vanderbilt had
4 also retained BBG to perform an appraisal
5 of 840 Atlantic Avenue in 2018?

6 A. I don't think so, sir.

7 Q. So that's also the first time
8 you're learning this?

9 A. I believe so.

10 Q. Okay. Is it common for the same
11 owner of a property to get multiple
12 appraisals of the same property in the
13 same time period?

14 MR. KOH: Objection.

15 THE WITNESS: No, I have
16 certainly seen that happen. I don't
17 know if it's common.

18 BY MR. WALSH:

19 Q. Can you think why that would be
20 necessary?

21 MR. KOH: Objection.

22 BY MR. WALSH:

23 Q. I'm sorry, what was your answer?

24 A. No, sir.

25 Q. And back in 2018, Vanderbilt had

1 TENER

2 provided KTR with a copy of a 2018 report
3 from TerraCRG. That was in your file. Do
4 you recall that?

5 A. Not particularly, sir.

6 Q. What do you know about
7 Metropolitan Valuation Services?

8 A. The real estate appraisal company
9 formerly owned by Marty Levine who is now
10 deceased and Steve Schleider, who was his
11 partner, both of which historically had
12 worked at KTR when they founded that
13 company. They are predominantly a
14 multi-family -- that's their -- more their
15 expertise. They originally -- when they
16 first formed the company it was
17 multi-family valuation services and they
18 renamed it to Metropolitan Valuation
19 Services.

20 Q. Do you know Dave Lyons?

21 A. No, sir.

22 MR. WALSH: If we can pull up
23 what's been previously marked as P27.

24 VERITEXT CONCIERGE: P27 has been
25 moved over.

1 TENER

2 BY MR. WALSH:

3 Q. This is an e-mail chain between
4 Vanderbilt and KTR from February 25, 2019.
5 And Tom Li on that day sent to you and
6 Shaun Kest the option rent addendum to the
7 McDonald's lease. Do you see that?

8 A. Yes, sir.

9 Q. And it looks like there was a
10 phone call that day. Do you recall that
11 phone call?

12 A. I don't recall it. I really
13 don't.

14 Q. Do you recall the first time that
15 you spoke with Tom Li or anyone else at
16 Vanderbilt about the option rent addendum
17 to the lease?

18 A. I have no clear recollection.

19 MR. WALSH: Okay. If we could
20 pull up what's been marked as P59.

21 VERITEXT CONCIERGE: P59 has been
22 moved over.

23 BY MR. WALSH:

24 Q. So this is an e-mail from the
25 same day from Tom Li to you and Shaun Kest

1 TENER

2 and he's providing you with Morris
3 Missry's contact information. Does that
4 refresh your recollection about what Tom
5 wanted to talk to you about and why he
6 sent you the option rent addendum?

7 A. I don't have clear recollections
8 of this was going on but there was a
9 period of time around this where we were
10 brought in to interview with Morris Missry
11 to potentially work as an expert in an
12 upcoming rent reset.

13 MR. WALSH: So if we could pull
14 up P60, please.

15 VERITEXT CONCIERGE: P60 has been
16 moved over.

17 BY MR. WALSH:

18 Q. This is a calendar invite dated
19 February 25th for a meeting at Wachtel
20 Missry on February 28, 2019. Is this that
21 interview with Morris Missry that you just
22 described?

23 A. Yes, sir.

24 Q. Who else was at that interview?

25 A. I think Shaun Kest. I can't

1 TENER

2 recall though.

3 Q. Anyone else besides Morris Missry
4 for Vanderbilt?

5 A. Yeah, I believe Sam Rottenberg
6 was at it. I don't recall if Mr. Li was
7 there.

8 Q. And what do you remember
9 discussing at that interview?

10 A. Our experience in litigation. It
11 was basically an interview to see if we
12 would be the appropriate expert in this
13 upcoming rent determination.

14 Q. And they asked specifically about
15 your litigation experience?

16 A. Yes, sir.

17 Q. Do you know or did they disclose
18 whether they were interviewing other
19 appraisers around this time?

20 A. They didn't tell me who but it
21 was pretty evident that it was a beauty
22 pageant to see who they wanted. They were
23 trying to -- who they thought would be the
24 appropriate expert.

25 Q. And what kind of questions --

1 TENER

2 what kind of things did they ask you about
3 besides your litigation experience?

4 A. I can't remember. I think they
5 might have asked if I had -- they
6 definitely asked if I had experience
7 working in Brooklyn that met the
8 requirements of this, that what type of
9 ground leases I've worked on in terms of
10 rent resets, what attorneys I'd worked
11 with. I don't recall details but I have
12 vague memories of that type of a
13 conversation.

14 Q. And did they tell you a range of
15 valuations that they were looking for?

16 A. No.

17 Q. Now when you were discussing a
18 potential update of the report with them
19 in the weeks before this, you said they
20 sent you some updated comps?

21 MR. KOH: Objection.

22 THE WITNESS: I think so. I
23 don't know if that was -- what period
24 of time that was. There was a period
25 of time when they sent us updated

1 TENER

2 comps but I don't know if that had to
3 do with this interview. I think that
4 preceded this interview. I can't
5 recall how much. That period of time
6 is not clear to me.

7 BY MR. WALSH:

8 Q. Do you recall if they asked
9 whether you believed you would be in the
10 same range of values for ground rent that
11 you arrived at in August 2018?

12 A. I don't recall any discussion of
13 value.

14 Q. Did Morris Missry or anyone else
15 around this time tell KTR what appraisal
16 method would be used to determine the fair
17 market rent of value under the option rent
18 addendum to the lease?

19 A. No, sir.

20 MR. WALSH: If we could please
21 pull up what's been previously marked
22 as P28.

23 BY MR. WALSH:

24 Q. This is the KTR engagement letter
25 dated March 8, 2019.

1 TENER

2 A. I'm not seeing it yet.

3 VERITEXT CONCIERGE: Just copying
4 it over. Sorry, it appears to be a
5 little slow right now. But it's in
6 there now.

7 BY MR. WALSH:

8 Q. It's P28.

9 A. It's up, sir.

10 Q. Okay. And so Morris Missry's law
11 firm ultimately retained KTR to serve as
12 McDonald's appraiser under the option rent
13 addendum to the McDonald's lease; right?

14 A. Yes, sir.

15 Q. Now, Vanderbilt had engaged KTR
16 directly for the August 2018 appraisal and
17 in January, KTR had sent Vanderbilt an
18 engagement letter addressed to Vanderbilt
19 for potential update but this engagement
20 letter is between KTR and Wachtel Missry.
21 Do you recall why there was a change?

22 MR. KOH: Objection.

23 THE WITNESS: I don't know if
24 they were related. I don't know
25 whether that initial proposal, what

1 TENER

2 that was for. This one certainly I
3 was aware that it would be for the
4 ground rent determination and in those
5 cases, I almost invariably are engaged
6 by counsel for one of the parties, not
7 by the party.

8 BY MR. WALSH:

9 Q. And why is that?

10 MR. KOH: Objection.

11 THE WITNESS: Generally it's to
12 preserve attorney/client privilege.
13 That I believe is the case but you
14 would have to ask counsel for that.
15 They are the ones who generally insist
16 upon it.

17 BY MR. WALSH:

18 Q. Do you know if Wachtel Missry
19 retained any other appraisers around this
20 time?

21 A. No, sir.

22 Q. Okay. Unlike the August 2018
23 appraisal and the January 2019 draft
24 engagement letter which gave sort of
25 generic reasons for the reason for the

1 TENER

2 appraisal, this engagement letter
3 specifically talks about the fair market
4 rental valuation process described in the
5 option rent addendum; right?

6 A. Yes, sir.

7 Q. How would that change in use
8 affect the scope of your work or just
9 generally the work you would need to do
10 for this engagement?

11 A. The option agreement specifies
12 the procedures under which this appraisal
13 proceeding would occur. Among other
14 things it dictated a letter of value to be
15 exchanged between two parties. It
16 anticipated the potential need for a third
17 appraiser. So the reporting requirements,
18 the directions within the lease all impact
19 the scope of work.

20 Q. Okay. At the -- maybe two-thirds
21 of the way down that first page, it says,
22 "It is anticipated that the FMV will be
23 based on the standard market data approach
24 technique for valuing vacant land (the
25 sales comparison approach)."

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TENER

2

Who suggested that language?

3

4

5

A. That language came out of the lease. The parenthetical was my interpretation of that language.

6

7

8

9

Q. Now, the option rent addendum calls for a valuation of the fair market rental value of the vacant land; is that right?

10

A. Can we turn to that?

11

Q. Sure, that was P27.

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A. Yes, it says, "The rental value shall be established based on the definition of fair market rental value which is a capitalized term as the price" and it goes on, "which an average well-informed tenant would pay and an average well-informed landlord would accept, exclusive of tenant's improvements, knowing all uses to which the property can be put, without duress on either party." And then it states that "The standard market data approach technique for valuing vacant land shall be used by the appraisers."

TENER

Q. Okay. And the next sentence says, "All comparable leases shall be appropriately adjusted, and the written reports shall indicate the reasons for the adjustments so made." And then it goes on to say that "If adequate comparable leases are not available, then a land residual technique shall be used."

Now, the fair market rental value of vacant land is not the same thing as the fair market value of vacant land; isn't that right, are they different concepts?

A. One is a defined capitalized term within the lease and the other is the value of the land, so the value of the land in my expert opinion is a component of the defined fair market rental value under the lease. It is a component. The value of the land is one component, the rent multiplier is the other.

Q. Once again, at page 2 of this engagement letter, you asked for copies of any leases that encumber the properties;

1 TENER

2 is that right?

3 A. I have the option rent up.

4 Which --

5 Q. Oh, it's P28.

6 A. Yes, sir.

7 Q. Okay. And even though you asked
8 for it again, they didn't provide you with
9 a copy of the Vanderbilt lease; right?

10 A. I don't believe we ever got that.

11 Q. At page 4 under basic assumptions
12 and limiting conditions, it says, "The
13 property is appraised free and clear of
14 any or all liens or encumbrances unless
15 otherwise stated."

16 Do you see that?

17 A. Yes, sir.

18 Q. So Vanderbilt had directed you to
19 appraise the property excluding the
20 encumbrance of the McDonald's lease;
21 right?

22 MR. KOH: Objection.

23 THE WITNESS: Are you talking
24 about in 2018?

25 ///

1 TENER

2 BY MR. WALSH:

3 Q. In 2019. In this letter.

4 A. In this assignment I was
5 appraising the property based on the
6 directions within the -- within the option
7 agreement, not with any other -- at no
8 direction from Vanderbilt.

9 Q. So I'm trying to understand what
10 the language that I just read to you on
11 page 4 means.

12 A. That's a standard basic
13 assumption and limiting condition included
14 in all of our appraisals. It states
15 that -- let's go back to it. You will
16 find this in every KTR appraisal. A
17 property is appraised free and clear of
18 all liens and encumbrances unless
19 otherwise stated. Most often this is
20 relevant to appraising a property
21 encumbered with a mortgage. We don't do
22 that. It's always free and clear of
23 financing and unless encumbrances are
24 identified, it is assumed that they don't
25 exist for the value defined. It is then

1 TENER

2 within the appraisal assignment you are
3 disclosing the encumbrances you are
4 considering and identify them and then if
5 necessary how they impact value.

6 Q. So at the time that you entered
7 into this lease -- strike that.

8 At the time you entered into this
9 engagement letter with Morris Missry, did
10 you believe that your valuation would
11 consider the encumbrance of the McDonald's
12 lease?

13 A. We were valuing it for the fair
14 market rent we set up in the McDonald's
15 lease. That was what the assignment was,
16 to determine the fair market rent so we
17 were looking at the specifics as defined
18 within this lease so it was considering
19 the lease.

20 Q. So you were considering the fact
21 that McDonald's had a lease to stay on the
22 property through 2039, you believed you
23 were going to consider that in your
24 analysis of valuation?

25 A. I think you're mixing

TENER

considerations. We were valuing the lease, the fair market rental value as defined within the lease and as directed within the lease that we are -- that we were considering. Then in determining the fair market value of the land and the rental value, at first there was communication that we should not consider the encumbrance of the ground lease in the determination of the fair market rental value. And I at one point spoke with counsel for clarifica -- counsel for Vanderbilt for clarification of whether the lease term would be considered and I made him aware of a court ruling that I believe that we should consider the term of the lease in the valuation of the land, provided that to Morris Missry, he read it and said that I was incorrect by doing so, that that would be tantamount to rewriting the lease and that I should not consider the term of the lease. And in my initial valuation when they engaged me, I did not consider the term of the lease in the

1 TENER

2 valuation.

3 Q. You believed that it should have
4 been considered; correct?

5 A. I believe that that court ruling
6 applied to this and gave it to counsel as
7 I would in any case that -- and sought
8 direction from counsel for legal issues.
9 I am not a legal expert.

10 MR. WALSH: Okay. If we could
11 pull up P29. And also P30, please.

12 VERITEXT CONCIERGE: P29 is in
13 there now and P30 is also in there
14 now.

15 MR. WALSH: And P31, please.

16 VERITEXT CONCIERGE: Okay, P31 is
17 also there.

18 BY MR. WALSH:

19 Q. So if we could start with P29.
20 On April 1st, you e-mailed Morris Missry
21 with a copy to Sam Rottenberg and you
22 said, "Are you available to quickly
23 discuss a question that I have about the
24 language of the lease?"

25 Why did you copy Sam Rottenberg?

1 TENER

2 A. Because he's the client
3 ultimately with his counsel.

4 Q. Now, before you sent this e-mail,
5 had you spoken with Sam or Morris about
6 whether you should consider the
7 encumbrance of the McDonald's lease in
8 your valuation?

9 A. I don't recall on the timeline.
10 I don't believe I had.

11 Q. Okay. And then if you could pull
12 up P30.

13 A. Is there a way to rotate these?
14 I found it, thank you.

15 Q. Okay.

16 A. I have it, sir.

17 Q. Okay. And so it looks like you
18 spoke with Morris that day like you
19 testified earlier and then after that
20 conversation, you sent him a copy of the
21 936 Second Avenue case; right?

22 A. Yes, sir.

23 Q. When you spoke with Morris, did
24 he sound familiar with the 936 Second
25 Avenue case?

1 TENER

2 MR. KOH: Objection.

3 THE WITNESS: I don't recall.

4 BY MR. WALSH:

5 Q. And so what do you remember about
6 that conversation before you sent the
7 case?

8 A. I remember saying that I was
9 aware of this appellate decision that had
10 impacted other ground rent resets and
11 other leases for omitting specific, call
12 it assumed where they in drafting maybe
13 they assumed that they didn't have to
14 specify that which was not specifically
15 excluded would be included, and I remember
16 using that phrase to him and I said this
17 is the -- this is the ruling, can you take
18 a look at it and see if it applies to our
19 subject? I think it does. And sent it to
20 Morris for his opinion and he replied as
21 you'll see in the e-mails.

22 Q. Now, before you sent him the
23 case, do you recall what his reaction to
24 what you're saying was?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: Yeah, I don't
3 recall what his reaction was.

4 BY MR. WALSH:

5 Q. Did anyone else participate in
6 that conversation?

7 A. I don't remember.

8 Q. Okay. And then at P31, this is
9 the e-mail that you're referring to when
10 Morris told you that he disagreed with
11 your conclusion and told you -- and
12 instructed you not to consider the
13 encumbrance of the McDonald's lease in
14 your analysis; right?

15 MR. KOH: Objection. Go ahead.

16 THE WITNESS: This was his legal
17 interpretation of it saying that that
18 would be tantamount to a modification
19 of the lease if we did this and that I
20 should not consider the term of the
21 lease. This was his direction as
22 counsel interpreting this appellate
23 division relative to our lease and the
24 direction I received as the appraiser.

25 ///

1 TENER

2 BY MR. WALSH:

3 Q. Did you agree with his
4 conclusion?

5 MR. KOH: Objection.

6 THE WITNESS: Again I'm not a
7 legal counsel. I gave it to him
8 because I thought it might be
9 applicable but this is his response.

10 BY MR. WALSH:

11 Q. Now, recognizing you're not an
12 attorney, did you agree with his
13 conclusion that it didn't apply?

14 MR. KOH: Objection.

15 THE WITNESS: Again, each case
16 has its own language and each document
17 has its own language. It's tantamount
18 to going to a dentist when you need,
19 you know, medical advice. You go to
20 the right person, you go to the
21 expert. He was the expert that was
22 involved in this case. I don't form
23 legal opinions.

24 BY MR. WALSH:

25 Q. Did you tell Shaun or Sam or

1 TENER

2 Morris that you disagreed with his
3 conclusion on this point?

4 A. I don't recall. I recall asking
5 for the advice. I believed when I
6 received it that it might be applicable
7 and that's why I asked them. I don't
8 recall telling them I disagreed or not but
9 in the end, I believed it was an incorrect
10 determination as he changed his mind at a
11 later meeting.

12 Q. Did you have any discussions with
13 Sam Rottenberg or Tom Li around this time
14 period about this 936 Second Avenue case?
15 I'm sorry, did you answer?

16 A. I said I do not recall, sir.

17 MR. KOH: We've been going about
18 90 minutes. Just wondering if now
19 might be an appropriate break.

20 MR. WALSH: Yeah, now would be a
21 fine time for a break and Mr. Tener,
22 it's up to you, we can take -- or you
23 and Cathi, I suppose, we can take a
24 lunch break now. We can come back.
25 I'm open to whatever everyone is

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TENER

comfortable with.

THE WITNESS: I'm going to defer
to Cathi but I would take a lunch
break.

MR. WALSH: Should we try to come
back around 1?

MR. KOH: That's good for me.

THE WITNESS: That works for me.

THE VIDEOGRAPHER: Thanks,
everyone. We're off the record at
12:26.

(Lunch recess taken at
12:26 p.m.)

1 TENER

2 A F T E R N O O N S E S S I O N

3 (Time noted: 1:03 p.m.)

4 T H O M A S J. T E N E R, resumed
5 and testified as follows:

6 THE VIDEOGRAPHER: The time is
7 approximately 1:03. We're back on the
8 record. This is the beginning of
9 media 3.

10 CONTINUED EXAMINATION

11 BY MR. WALSH:

12 Q. So before our break, Mr. Tener,
13 you said that you had sent the 936 Second
14 Avenue case to Mr. Missry because you
15 thought it applied and you were looking
16 for direction from counsel; is that right?

17 MR. KOH: Objection.

18 THE WITNESS: I thought that it
19 might apply and I was looking for
20 interpretation from -- legal
21 interpretation from counsel.

22 BY MR. WALSH:

23 Q. And I guess -- why was it
24 important for you to know whether or not
25 this case applied?

1 TENER

2 A. To know whether the tenant, the
3 value was based on a 20-year term or an
4 unlimited term.

5 Q. And so whether or not the case
6 applied would have impacted your analysis
7 in the first instance?

8 A. Yes.

9 Q. And how would it have impacted
10 your analysis in the first instance?

11 A. The pool of comparables,
12 comparable ground leases that you might
13 consider would have to be looked at in
14 terms of how much control the -- how long
15 the tenant controls this, the subject
16 property, how long they have only 20 years
17 to get their return on their investment
18 rather than over a longer period of time,
19 it would impact the development potential
20 of the site. As I noted in my report, or
21 in the evolution of my report, I didn't
22 consider residential development feasible
23 to get your return on and of that in a
24 20-year period, that I thought that retail
25 would.

1 TENER

2 Q. And it would have impacted your
3 valuations; is that right?

4 A. In the way I described.

5 Q. And so would it have resulted in
6 a lower valuation if you had considered it
7 in your April 15, 2019 report?

8 A. I don't know, sir. In reality,
9 it did not because the retail component
10 ended up driving most of the value. As
11 I -- as I reported in my appraisal, the
12 low cost of the retail and the relative
13 value or rent that you could achieve from
14 that once you amortized the cost of
15 constructing a single-story retail on the
16 site ended up at a value that closely
17 proximated the conclusion exclusive of the
18 period of control being unlimited.

19 Q. So we'll get to those conclusions
20 in a bit but you said earlier that you
21 would have looked at different comps in
22 the first instance; right?

23 A. Yeah, I would have -- so as I
24 said earlier, there are -- I didn't have
25 any -- I was not aware of any ground lease

1 TENER

2 comparables that were for less than 49
3 years so or 20-year period ground lease
4 comparables, so that pretty much ruled out
5 an analysis of short-term ground leases,
6 and secondly what we could build would
7 change.

8 Q. Would you have done a land
9 residual analysis in the first instance if
10 Morris had instructed you to follow the
11 rule announced in the 936 Second Avenue
12 case?

13 MR. KOH: Objection. Go ahead.

14 THE WITNESS: Can you repeat
15 that? I want to make sure I
16 understand.

17 BY MR. WALSH:

18 Q. Sure. Would you have done a land
19 residual analysis in the first instance,
20 meaning in your April 2019 report, if
21 Morris had instructed you to follow the
22 rule announced in the 936 Second Avenue
23 case?

24 MR. KOH: Same objection.

25 THE WITNESS: As I did once it

1 TENER

2 was clarified, that that ruling did
3 apply, I did include the residual and
4 I would have done prior.

5 MR. WALSH: Okay. So if we could
6 pull up VA 000587.

7 VERITEXT CONCIERGE: This will be
8 introduced as Exhibit P70.

9 (Exhibit P70, document Bates
10 labeled VA 000587, marked for
11 identification.)

12 BY MR. WALSH:

13 Q. So Mr. Tener, this is a March --

14 A. It's not there.

15 Got it. Hold on, let it come up.
16 Yes, sir.

17 Q. This is a March 25, 2019 e-mail
18 from you to Sam Rottenberg and Morris
19 Missry. Now this is a few days before you
20 exchanged e-mails with Morris about the
21 Second Avenue case. You wrote, "We will
22 be wrapping up the letter of value within
23 the next few days. Let's schedule a
24 discussion for later this week. What are
25 your schedules for Thursday looking like?"

1 TENER

2 What did you want to discuss with
3 him?

4 A. I don't recall but I'm assuming
5 my preliminary results.

6 Q. And do you recall if this
7 conversation occurred?

8 A. I don't recall.

9 Q. And does this refresh your
10 recollection about whether the issue of
11 the encumbrance of the lease and current
12 zoning came up in discussions before April
13 1, 2019?

14 A. I'm sorry, sir?

15 Q. Does this refresh your
16 recollection about whether the issue of
17 the encumbrance of the lease and current
18 zoning came up in discussions before April
19 1, 2019?

20 A. No, it doesn't.

21 MR. WALSH: If we could please
22 mark VA 000664.

23 (Exhibit P71, document Bates
24 labeled VA 000664, marked for
25 identification.)

1 TENER

2 VERITEXT CONCIERGE: This will be
3 introduced as Exhibit P71.

4 BY MR. WALSH:

5 Q. So on April 2, 2019 you sent an
6 e-mail to Morris only and you attached a
7 draft fair market value determination
8 letter for 840 Atlantic Avenue and you
9 gave it to him in Word format so in your
10 comments that he could make suggested
11 edits and track changes.

12 Do you typically send draft Word
13 versions of your reports to clients before
14 they are issued?

15 A. Only to counsel. Generally
16 counsel will review my reports relative to
17 the legal issues at hand and oftentimes
18 want to make suggested edits. I don't
19 always accept them but I give counsel
20 opportunity to review my work product as
21 an expert.

22 Q. Do you recall if you made any
23 changes to your report as a result of any
24 preliminary discussions you had with
25 Morris or Vanderbilt before you formally

1 TENER

2 issued the report?

3 A. I don't recall. There would be a
4 comparison I assume between the two
5 documents.

6 MR. WALSH: If we could pull up
7 P33.

8 VERITEXT CONCIERGE: P33 has been
9 copied over.

10 BY MR. WALSH:

11 Q. This is a response from Sam
12 Rottenberg on April 11, 2019.

13 Do you see that?

14 A. Yes, sir.

15 Q. And so it looks like you actually
16 also sent your report to Sam; right?

17 A. I don't know if I sent it or if
18 Morris forwarded it to him.

19 Q. Okay. Well, your e-mail below
20 asked him if he had any comments on the
21 draft. I guess you were asking Morris
22 with a copy to Sam. "Do you have any
23 comments on the draft report?" And Sam
24 responded "The only comment (to the extent
25 I have one) is that perhaps there might be

1 TENER

2 a little room to be a bit more aggressive
3 on the residential valuation."

4 What was your reaction to Sam's
5 e-mail?

6 A. Same as I have to any client, the
7 things that I'm not in agreement with them
8 in terms of their viewpoint on value, I'm
9 the professional, I don't -- if you want
10 to present facts to me I will consider
11 them but if you say things like that I
12 basically ignore them.

13 Q. So you ignored this?

14 A. Yes, sir.

15 Q. Did you have a discussion with
16 Sam or anybody else about his comment?

17 A. Not that I recall but if it
18 was -- if I did have one, I would have
19 told you exactly or similar, maybe more,
20 respectfully I would have said the same
21 thing.

22 MR. WALSH: If we could please
23 pull up VA 001506.

24 (Exhibit P72, document Bates
25 labeled VA 001506, marked for

1 TENER

2 identification.)

3 VERITEXT CONCIERGE: This will be
4 marked as Exhibit P72.

5 THE WITNESS: It's up.

6 BY MR. WALSH:

7 Q. Okay. So on April 15th, you
8 e-mailed Morris again with a copy to Sam
9 and asked him if he had any comments;
10 right?

11 A. Yes.

12 Q. And again, is this consistent
13 with your standard practice?

14 A. Yes, for legal proceedings.

15 Q. And do you recall if he
16 responded?

17 A. I don't recall.

18 Q. Do you recall if you had a
19 discussion with him about it?

20 A. I don't think there were any
21 changes. I don't think -- I don't recall
22 honestly.

23 MR. WALSH: Okay. If we could
24 please pull up P32. And Mr. Tener, it
25 may be easier, this is also in the

1 TENER

2 binder so it's up to you. It's

3 VA 001940.

4 THE WITNESS: Is that in binder

5 2?

6 MR. WALSH: Probably.

7 VERITEXT CONCIERGE: P32 has been

8 copied over.

9 BY MR. WALSH:

10 Q. So this is the original valuation

11 report that you prepared for Vanderbilt

12 for the fair market rental valuation

13 process described in the option rent

14 addendum to the McDonald's lease; right?

15 A. I believe so.

16 Q. And it's dated April 15, 2019?

17 A. Yes, sir.

18 Q. Okay. And both you and Shaun

19 Kest signed this letter; right?

20 A. Correct.

21 Q. And even though you both signed

22 it, you take full responsibility for

23 everything that's in this report; right?

24 A. Yes.

25 Q. By the way, is Shaun still at

1 TENER

2 KTR?

3 A. No.

4 Q. Where is he now?

5 A. He works for Addison Young.

6 Q. When did he leave?

7 A. Earlier this year.

8 Q. Did he give any reason for his
9 departure, do you know why he left?

10 A. He was offered a lot of money.

11 Q. Did Shaun ever express concern to
12 you about decisions you were making on
13 appraisals you were working with him on?

14 A. No, sir.

15 Q. So he said it was purely about
16 money?

17 A. Yes, sir.

18 Q. Do you know if he agreed with
19 Vanderbilt's decision not to consider the
20 encumbrance to the lease?

21 MR. KOH: Objection.

22 THE WITNESS: Yes, I do know
23 he agreed. Did not include the
24 encumbrance?

25 ///

1 TENER

2 BY MR. WALSH:

3 Q. I want to know if he agreed with
4 Vanderbilt's decision to tell you to not
5 consider the encumbrance to the lease?

6 MR. KOH: Objection.

7 THE WITNESS: I misunderstood the
8 question, I'm sorry. He never raised
9 the point. I was the one who raised
10 the point.

11 BY MR. WALSH:

12 Q. Did you ever discuss it with him?

13 A. Only when the decision was made
14 which way we would go. It wasn't
15 Vanderbilt's, it was Wachtel Missry's
16 decision so I don't recall him ever
17 expressing any opinion about it. Again, I
18 don't think he was even aware of the
19 Second Avenue decision.

20 Q. Now, you just said that it wasn't
21 Vanderbilt's decision, it was Wachtel
22 Missry's decision. How do you know that?

23 A. Because the communication came
24 from Morris Missry and it was his
25 interpretation of the lease. It says in

1 TENER

2 his e-mail to me I read it and he -- it
3 was his legal interpretation. I would
4 assume that he wasn't lying to me.

5 Q. Do you know if he had discussed
6 it with his client?

7 A. I don't think he spent a lot of
8 time on the -- I think there wasn't much
9 of a lapse between when I sent it to him
10 and when he responded. I do not know if
11 he spoke to him but it seemed like he read
12 the document and got back to me very
13 quickly.

14 Q. Turning to page ending -- I guess
15 it's page 4 of that report. It's the page
16 ending in 1944. You concluded that the
17 fair market rental value of 840 Atlantic
18 Avenue as of April 8, 2019 was \$1,348,000
19 per year; right?

20 A. Yes.

21 Q. And that was higher than the
22 estimated ground rent you included in your
23 August 30, 2018 report to Vanderbilt;
24 right?

25 A. Yes, sir.

1 TENER

2 Q. And back then you had concluded
3 that as of August 30, 2018, the property
4 was -- the fair market rental value of the
5 property was 1,098,000 dollars per year;
6 right?

7 A. Yes, sir.

8 Q. So your estimated value increased
9 more than 22 percent between August 2018
10 and April 2019; right?

11 A. Do you want me to do the
12 calculation?

13 Q. Sure. 1,348,000.

14 A. What was the original one?

15 Q. 1,098,000.

16 A. 22.77 percent.

17 Q. Okay. So your conclusion was
18 that the fair market rental value of the
19 property increased 22.7 percent from
20 August 2018 to April 2019; is that right?

21 A. Based on the -- all of the
22 changes within the two reports, I don't
23 believe the first one considered the lease
24 and uses and direction. That was my
25 conclusion.

1 TENER

2 Q. Okay, but this report also didn't
3 consider the lease and the uses; right?

4 A. This report considered the lease,
5 not the lease term.

6 Q. I see.

7 A. As directed within the lease.
8 The first one was not as directed within
9 this lease.

10 Q. Okay. Was this nearly 23 percent
11 change representative of changes in value
12 that were occurring all over the area
13 during this time?

14 A. What do you mean by all over the
15 area?

16 Q. I guess -- was this change
17 consistent with what you were seeing in
18 the market between August 2018 and April
19 2019?

20 MR. KOH: Objection.

21 THE WITNESS: Again, what market?

22 BY MR. WALSH:

23 Q. The relevant market for this area
24 of Brooklyn.

25 A. So there was significant -- there

1 TENER

2 were significant increases but this is all
3 attributable to the most recent and
4 relevant comparables that we analyzed.
5 The use conclusions and ground rent rate
6 conclusion that we reached in the FMV
7 determination.

8 Q. Okay. And like you used in the
9 August 2018 report, you used the land
10 sales comparison in your April 15, 2019
11 report; right?

12 A. Yes, sir.

13 Q. And not by gathering, comparing
14 and adjusting comparable ground leases;
15 right?

16 A. Correct, sir.

17 Q. In the second full paragraph on
18 page 2 of your report, you write, "The FMV
19 of the demised premises is a function of
20 the market value of the subject land and
21 the ground rent percentage that," quote,
22 "an average well-informed tenant would pay
23 and an average well-informed landlord
24 would accept, exclusive of tenant's
25 improvements, knowing all of the uses to

1 TENER

2 which the property can be put, without
3 duress on either party."

4 The second part of that sentence
5 where I noted that I was quoting, that's a
6 quote from the option rent addendum to the
7 lease; right?

8 A. Yes, sir.

9 Q. But the first part of the
10 sentence, specifically the FMV of the
11 demised premises is a function that the
12 market value of the subject land and the
13 ground rent percentage. That part is not
14 taken from the lease; right?

15 A. No, sir.

16 Q. So where did that come from?

17 A. That comes from my understanding
18 of the components that make up the fair
19 market rent of a ground lease. Land value
20 and a rent multiplier or a ground rent
21 percentage as used in this sentence.

22 Q. Does the option rent addendum
23 talk about the market value of the subject
24 land?

25 A. It does not. It states value in

1 TENER

2 vacant land.

3 Q. And then it talks about adjusting
4 comparable leases if they are available;
5 right?

6 A. It does state that also, yes.

7 Q. Okay. Did Morris Missry or
8 Vanderbilt suggest that you should
9 value -- that you should estimate the
10 value using the market value of the
11 subject land and the ground rent
12 percentage?

13 A. Neither gentlemen suggested
14 anything about how I appraise the property
15 in terms of what methods, what approach.
16 The input that Morris Missry gave me was
17 limited to the applicability of the Second
18 Avenue case, the input from Sam was
19 limited to what you saw, some critiques of
20 whether I was high enough in his opinion
21 of land value. Nothing about methodology
22 or appraisal techniques. That was left up
23 to me, the expert.

24 Q. Okay, but you asked for Morris
25 about a legal opinion on the 936 Second

1 TENER

2 Avenue case, right, because he's a lawyer?

3 A. Yes.

4 Q. But you did not ask him for a
5 legal opinion on how he believed the
6 option rent addendum required you to value
7 the property?

8 A. I didn't have any questions about
9 that -- or let me check that answer.

10 I don't know if I did ask him
11 about any of the -- I don't recall if I
12 asked him anything about some of these
13 provisions because there are some
14 sentences in here that aren't exactly
15 clear. I may or may not have asked him
16 for clarification on that but I don't
17 recall.

18 Q. Going back to page 2, the third
19 full paragraph towards the bottom, right
20 above that chart of the zoning area.

21 A. I'm sorry.

22 Q. Page 2, yeah. This is the page
23 ending in 1942. You wrote, "Based on the
24 subject's current zoning and considering
25 the uses exhibited by recent development

1 TENER

2 in the immediate area, the highest and
3 best use of the subject, as if vacant,
4 would be commercial development in the
5 portion of the site zoned M1-1 and
6 residential development in the R6B zoned
7 portion of the site."

8 Do you see that?

9 A. Yes, sir.

10 Q. Now is this what appraisers
11 generally refer to as a highest and best
12 use conclusion or analysis?

13 A. This is a conclusion, not the
14 analysis, because this is a restricted
15 report and is not explaining every detail.

16 Q. Okay. What is highest and --
17 what is the highest and best use analysis?

18 A. It is an analysis of the legally
19 permissible, physically possible,
20 maximally productive uses that a site can
21 be put to that returns the highest value
22 to the site.

23 Q. Now, you said legally
24 permissible, physically possible,
25 maximally --

1 TENER

2 A. Maximally productive. There are
3 four tests I would have to go exactly to.

4 Q. We can get to that. Does the
5 highest and best use also need to be
6 financially feasible?

7 A. Yes, sir.

8 Q. And whenever a market value is
9 developed, a highest and best use analysis
10 is necessary; right?

11 A. Yes, sir.

12 Q. And would you agree that if the
13 highest and best use is not adequately
14 addressed, an appraiser may
15 inappropriately analyze the property being
16 appraised?

17 A. Yes, sir.

18 Q. Okay. So if a use is physically
19 possible, legally permissible and
20 financially feasible, you then test to see
21 what -- whether I guess that use is
22 economically productive; right?

23 A. Maximally productive.

24 Q. Maximally productive. So where
25 did you do that analysis in order to reach

1 TENER

2 this conclusion on page 2?

3 A. My analysis was conducted at my
4 desk, analyzing the data that I had in
5 front of me, recognizing the typical uses
6 that were out there, the development
7 around the property, the conformity of
8 use, and based on my review of the
9 economics of the development that was
10 going on in this location and the zoning
11 that is legally permissible, that a mixed
12 use development of residential and
13 commercial would provide the -- would be
14 the highest and best use of the site. So
15 I did that at my desk analyzing the data
16 in front of me.

17 Q. What other uses did you try to
18 test to see if they would be maximally
19 productive?

20 A. The only other use that I
21 considered was community facility and that
22 is more of a developer's option whether
23 they want to include that. It doesn't
24 materially change the economics of the
25 development.

1 TENER

2 Q. Okay. Now do you agree that a
3 long-term ground lease could affect the
4 highest and best use of the market value
5 of the property?

6 A. Yes, sir.

7 Q. So if a property is subject to a
8 ground lease that has 20 years left on it,
9 it may not be economically feasible to
10 demolish the building that's on the
11 property and then construct a new building
12 within that lease term; right?

13 A. Yes, sir.

14 Q. And at the very least, you would
15 need to do an economic analysis before
16 arriving at a conclusion as to the highest
17 and best use if there was a ground lease
18 in place; right?

19 A. I don't -- please repeat your
20 question.

21 Q. So assume for a moment that a
22 ground lease was in place here, which
23 there was, although they told you to
24 ignore it, had they told you to consider
25 the ground lease, you would have needed to

1 TENER

2 do an analysis to see what was possible
3 within a 20-year period; right?

4 A. Yes, sir.

5 Q. But you didn't do that in April
6 of 2019; right?

7 A. There was no restriction
8 according to Morris Missry's determination
9 of lease term. I did consider it once the
10 20-year term was ruled or agreed to be
11 applicable and that's what is reflected in
12 my final report from July 30th. As
13 detailed or discussed in that report, the
14 economics did not materially change
15 because the retail component building and
16 inexpensive single-story retail add
17 extremely low cost of what a D type
18 construction retail would cost provided
19 adequate return over a 20-year period. So
20 in this case because retail drove so much
21 of the value that it ended up being
22 economically feasible in my opinion and my
23 analysis which is included in my July 30th
24 report.

25 Q. Okay, we'll get there. But you

1 TENER

2 mentioned before that one of the reasons
3 that it was important for you to
4 understand whether the lease, the
5 McDonald's lease needed to be considered,
6 the 20-year term, was because it would
7 impact the comparables; right?

8 A. It would impact potential
9 comparables, yes.

10 Q. And because you could only use
11 potential comparables that had the same
12 highest and best use, right, as the
13 McDonald's property was as encumbered;
14 right?

15 A. The question about the
16 comparables was the term of the lease that
17 if you could only -- if the tenant only
18 controlled the property for 20 years and
19 you were looking for comparable ground
20 leases that were developed to their
21 highest and best use rather than an
22 interim use, which is not the highest and
23 best use, it's an interim use by
24 definition, you would be looking at
25 comparables that don't reflect the highest

1 TENER

2 and best use, they reflect -- I'm
3 repeating myself, that reflect an interim
4 use. So the inclusion or the recognition
5 that the tenant -- that the -- that this
6 particular appraisal assignment required
7 us to consider a 20-year hold period or
8 control period by the tenant limited the
9 comparable data, there were no comparables
10 identified by KTR of 20-year ground leases
11 developed to the highest and best use. As
12 such, the residual was processed.

13 MR. WALSH: If we could mark
14 VA 000117. Now this is an Excel
15 spreadsheet so you're going to have to
16 pull it up in Exhibit Share.

17 (Exhibit P73, document Bates
18 labeled VA 000117, marked for
19 identification.)

20 VERITEXT CONCIERGE: This will be
21 marked as P73 and it should be in
22 there now.

23 BY MR. WALSH:

24 Q. Mr. Tener, this document was
25 contained in Vanderbilt's production.

1 TENER

2 It's an Excel file with the name
3 19-1-00075-840 Atlantic Ave FINAL.xls.

4 Do you see that?

5 A. Yes, sir.

6 Q. What is this document?

7 A. This is the file, Excel work file
8 or working product for my July -- I
9 believe it's the July 30th report. Let me
10 make sure. I believe this is the -- I
11 believe it's for the July 30th report.

12 Q. Well, would there have been any
13 differences in this spreadsheet from April
14 to July?

15 A. The July -- I added a residual
16 but I believe it was under a separate
17 Excel.

18 Q. I think that's in a different
19 file. So this spreadsheet wouldn't have
20 changed from April 15 to July 30, 2019;
21 right?

22 A. I don't know. I don't know if
23 there were any changes. I don't recall.

24 Q. If you could look at the tab land
25 sale grid M1-1.

1 TENER

2 A. Yes, sir.

3 Q. On page 3 of your report you
4 state that you identified and analyzed
5 three sales of M1-1 zoned development
6 sites and five sales of similarly zoned
7 residential development sites. Are these
8 the three M1-1 sites referenced in your
9 report?

10 A. Yes, sir.

11 Q. Were any of these three sites
12 encumbered by ground lease when they were
13 sold?

14 A. I don't believe so, sir.

15 Q. Would you have checked?

16 A. Yes, sir.

17 Q. And why would you have checked?

18 A. I would have looked to see if
19 they were fee simple sales.

20 Q. Would you have also looked to see
21 if there was a ground lease encumbering
22 the property like there was at
23 840 Atlantic?

24 A. We would have been looking to see
25 if they were encumbered, whether it was a

1 TENER

2 fee simple or a lease fee. If it turned
3 out that they were lease fee, then we
4 would investigate as best we can the
5 economics of the encumbered lease and
6 maybe or maybe not include them in this
7 analysis.

8 Q. So if you had in April 2019 been
9 valuing 840 Atlantic Avenue as encumbered
10 by the 20-year term of the McDonald's
11 lease, would you still have used these
12 three properties as comparables in your
13 analysis?

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: I did in my final
16 so I would say yes.

17 BY MR. WALSH:

18 Q. Would you have looked for
19 properties that had been sold that were
20 encumbered by a ground lease?

21 MR. KOH: Objection.

22 THE WITNESS: I need to think
23 about that. Ask it again, would I
24 have?

25 ///

1 TENER

2 BY MR. WALSH:

3 Q. Would you have looked for
4 properties that had been sold that were
5 encumbered by a ground lease when they
6 were sold?

7 A. Based on --

8 MR. KOH: Same objection. Go
9 ahead.

10 THE WITNESS: Based on which
11 analysis?

12 BY MR. WALSH:

13 Q. If you had been asked to consider
14 the encumbrance of the 20-year term of the
15 McDonald's lease in April of 2019.

16 MR. KOH: Same objection.

17 THE WITNESS: I'm not sure.

18 BY MR. WALSH:

19 Q. Isn't this an apples to oranges
20 comparison if you're valuing properties,
21 if you're valuing a property that is
22 encumbered by a 20-year lease compared to
23 properties that are not encumbered by a
24 ground lease, isn't that apples to
25 oranges?

1 TENER

2 A. It's not apples to oranges but
3 it's certainly recognizing that the tenant
4 has control over the property for a
5 shorter duration, and if my residual had
6 not shown values that were bracketing the
7 number that came from this ground lease
8 analysis, I probably would have dismissed
9 it as not being economically feasible, but
10 because the residual illustrated that it
11 would be economically feasible, my
12 conclusion was that the general soundness
13 of the initial economics of the ground
14 lease were supported by the residual and
15 not overly impacted by the shortened term.

16 Q. Well, by the time you had done
17 the land residual analysis, you had
18 already issued a report to Vanderbilt that
19 had your valuation; right?

20 A. I did, sir.

21 Q. And that valuation was as
22 unencumbered by the 20-year McDonald's
23 lease; right?

24 A. Are you referring to the --

25 Q. The April 2019 report.

1 TENER

2 A. Not the 2018 report.

3 Q. The April 2019 report.

4 A. Yes, sir.

5 Q. And so that valuation was not
6 encumbered by the McDonald's lease?

7 A. Yes, sir.

8 Q. And so I guess -- I'm trying to
9 take you back to April; right? So before
10 you had completed this analysis, right, so
11 assume you had known that you were
12 supposed to consider the encumbrance to
13 the lease, wouldn't you had to have made
14 certain adjustments in this grid to
15 reflect sort of the difference in what's
16 being sold as far as properties that are
17 not encumbered and comparing a property
18 that is encumbered?

19 MR. KOH: Objection. Go ahead
20 and answer.

21 THE WITNESS: I think what you
22 mean in terms of that question is -- I
23 want to clarify the question. When
24 you say encumbered you mean by the
25 period of time?

1 TENER

2 MR. WALSH: By the period of the
3 lease, yes.

4 MR. KOH: Same objection.

5 THE WITNESS: One would think
6 that would be a factor and it
7 certainly was investigated by myself.
8 I'm losing my train of thought so I
9 don't want to -- I do have an answer
10 for it but I lost my train of thought.

11 BY MR. WALSH:

12 Q. Right. So what I'm trying to
13 understand is, had you been aware in April
14 2019 that the property needed to be valued
15 as encumbered by the 20-year term of the
16 lease and you're doing this land sales
17 comparison method and you're adjusting to
18 make them comparative, wouldn't an
19 adjustment have been required to reflect
20 the difference between these properties
21 that were not encumbered by the lease and
22 then trying to arrive at a value for a
23 property that is encumbered by a 20-year
24 term lease?

25 A. Thank you for your patience. You

1 TENER

2 got me back on my train of thought.

3 MR. KOH: Objection.

4 THE WITNESS: The value of the
5 land that is in all these has nothing
6 to do with the term. The land is
7 valued and it's fee simple. The rent
8 is a factor of the multiplier of that
9 period of time. Because when it
10 became a 20-year period the use
11 shifted to retail, the economics of
12 both developing it and the ground rent
13 percentage multiplier changed from the
14 initial one. They just happened to
15 change in a way that did not alter the
16 conclusion based on a mixed use
17 development. So the land value stays
18 the same. You pay rent based on a
19 percentage of land value. The use of
20 that land value was impacted by the
21 20-year term that shifted it to retail
22 which had different economics,
23 different development, different
24 return on the investment which would
25 have affected my rent multiplier

1 TENER

2 determination.

3 BY MR. WALSH:

4 Q. Well, I'm sorry if I'm not being
5 clear. Here's what I'm trying to
6 understand. I know that later on you did
7 a land residual analysis; right? What I'm
8 trying to understand is had you known in
9 April 2019, how would you have accounted
10 for the 20-year term of the McDonald's
11 lease in this analysis that we're looking
12 at in your spreadsheet here which we've
13 marked as P73?

14 MR. KOH: Objection.

15 THE WITNESS: I would have looked
16 at the uses that the site could have
17 been developed under under that period
18 of time which would have been
19 primarily retail uses, the M1 zone,
20 and concluded based on that use and
21 that's -- that would have driven the
22 resultant multiplier and the resultant
23 value.

24 BY MR. WALSH:

25 Q. Okay. So which was more

1 TENER

2 valuable, the M1-1 portion of the site or
3 the R6B site?

4 A. Because of the size of the land
5 area, the M1-1 was.

6 Q. What about just on a
7 per-square-foot basis, what's more
8 valuable, the M1-1 or the R6B?

9 A. It's not per square foot because
10 each one has a different multiplier. The
11 M1-1 had a higher price per square foot of
12 the ZFA but only had a 1 ZFA. The
13 residential had a lower price per ZFA but
14 it had a 3.44 floor area ratio.

15 Q. So what I'm trying to understand
16 is you said that you would have excluded
17 the R6B portion of your analysis had you
18 known the 20-year term needed to be
19 considered in April 2019; right?

20 A. I would have given less weight to
21 that component of it in the election of
22 the -- of the rent multiplier. You're not
23 going to give them the residential land
24 for free in a lease document because --
25 but you're not going to presume that it

1 TENER

2 gets developed. In my residual analysis
3 which I would have done in the April '19
4 appraisal, I utilized the residential land
5 area as parking and as access to below
6 grade parking. So it's used, it's just
7 not used for residential development
8 because in my conclusion, residential
9 development, you could not get your return
10 on and of the investment in a 20-year
11 period.

12 Q. So what would have been the
13 impact to your valuation had you excluded
14 the R6B portion in April 2019 and
15 considered it as primarily M1-1 use?

16 MR. KOH: Objection.

17 THE WITNESS: The same conclusion
18 that I reached in the July 30th.

19 BY MR. WALSH:

20 Q. How do you know that?

21 A. Because I did the analysis.

22 Q. Well no, but what I'm saying is
23 you only did that analysis after the fact.
24 What I'm trying to understand is in this
25 spreadsheet we're looking at here, P73,

1 TENER

2 what would the impact have been?

3 A. There wouldn't have been an
4 impact in this spreadsheet. What I'm
5 saying is those land values would not have
6 changed. They are fee simple land values.
7 The multiplier and the contributory
8 portion of the R6 versus M1 would shift
9 like it did in my July 30 report. Exactly
10 what I wrote in the July 30th report would
11 have been the report that I had written on
12 April 15th. There would have been no
13 changes.

14 Q. There would have been absolutely
15 no changes?

16 A. The July 30th report would have
17 been my report.

18 Q. Okay. So once you arrived at an
19 estimated land value in the manner that
20 you did considering both a residential and
21 manufacturing use, you needed to convert
22 that land value to an annual fair market
23 rental value for ground lease; right?

24 A. Yes, sir.

25 Q. And your report says on page 3

1 TENER

2 under FMV determination, this is the page
3 ending in 1943, "In order to estimate the
4 FMV of the demised premises, KTR analyzed
5 the economic terms of relevant ground
6 leases in Brooklyn, Queens and Manhattan."

7 Do you see that?

8 A. Yes, sir.

9 Q. Were these the same relevant
10 ground leases that you used for your
11 August 2018 appraisal?

12 A. Yes, sir. I'm sorry, August
13 2018? I think so.

14 Q. And your August 2018 appraisal
15 sought to estimate the annual ground rent
16 for a 99-year ground lease?

17 A. Yes, sir.

18 Q. And what term did you estimate
19 ground rent for in your April 15, 2019
20 report?

21 A. I didn't specify.

22 Q. Would those 99-year ground
23 leases, are those relevant when you're
24 considering a lease that only has 20 years
25 left?

1 TENER

2 A. They are not all 99 years. Some
3 are 49 years. Most of these are 20-year
4 rent reset periods so yes, they are
5 relevant.

6 Q. Well, but earlier you testified
7 that you were trying to figure out rent
8 for 99 years in August 2018; right?

9 A. No, I didn't say that. I just
10 said it didn't have a -- I didn't say for
11 99 years. I said it didn't have a -- it
12 was unencumbered.

13 Q. Well, you assumed it was for a
14 99-year term in August 2018, that's what
15 your report says?

16 A. I think that's what my report
17 says, yes.

18 Q. Okay. But now you're considering
19 for a up to 20-year term; right?

20 MR. KOH: Objection. Go ahead.

21 THE WITNESS: Yes.

22 BY MR. WALSH:

23 Q. And it's your testimony that the
24 same -- you can use the same leases for
25 both analyses?

1 TENER

2 MR. KOH: Objection. Go ahead.

3 THE WITNESS: My testimony is
4 that those leases have rent resets
5 from which these rates are extracted
6 that are similar to 20-year terms.
7 Then there is another fair market rent
8 determination that occurs typically or
9 the lease ends but these rent resets
10 are where these rent multipliers are
11 derived from. So the term is not
12 inconsistent with the lease term of
13 the McDonald's lease.

14 BY MR. WALSH:

15 Q. But it would have been
16 inconsistent with the 99-year term assumed
17 in your August 2018 report; right?

18 A. Remember, I'm going state it
19 again, that in those 49- and 99-year
20 leases there are rent resets that occur.
21 That's where these numbers are coming from
22 so they are applicable.

23 Q. So in August 2018, you stated
24 that the 840 Atlantic Avenue property
25 would likely command a ground rent of 4 to

1 TENER

2 5 percent of the current land value, had
3 it not been for the strong likelihood that
4 the M-Crown zoning would be passed in the
5 first term of the ground lease; right?

6 A. Yes, sir.

7 Q. But in April -- in April 2019 --
8 and you ultimately used a 6 percent rate
9 in August 2018; right?

10 A. In 2018, yes, sir.

11 Q. But in 2019, April 2019, you
12 concluded that 8 percent of the fair
13 market value of the property would be
14 consistent with the market for ground
15 leases; right?

16 A. Yes, sir.

17 Q. And that was with the identical
18 pool of leases that you were using to make
19 that comparison; right?

20 A. Yes, sir.

21 Q. So what changed from August 2018
22 to April 2019 to change your conclusion of
23 the appropriate rent to be applied?

24 A. So when we looked at the
25 initial -- I would have -- I want to go

1 TENER

2 back to my initial report because I'm
3 losing what my rationale was. I know I
4 had one. I would like to pull up my
5 initial --

6 Q. Sure. So you can do it in two
7 ways. It's either the very -- I guess the
8 second document in binder one. It's 02,
9 or it's P22 electronically. And that
10 ground rent analysis was at page 69 which
11 is VA 082 to 083.

12 A. Can I have some time just to read
13 this?

14 Q. Sure.

15 A. (Witness perusing document.)

16 This is twofold. First, the
17 initial assignment was not advised by the
18 definitions within the rent option and
19 secondly, the -- the focus on how much of
20 this site would be attributable to retail
21 development informed the decision closer
22 to the 10 percent ratio than was the
23 earlier one. So basically in the analysis
24 of the rent reset, it was recognized the
25 majority of this or the driving factor in

1 TENER

2 development of this site as stressed by
3 the ground lease or the McDonald's lease
4 would tend towards the retail which slid
5 up towards the higher end of the range.
6 My comparables for retail ground leases
7 were largely at 10 percent so at the end
8 of our conclusion we felt -- I felt that
9 an 8 percent ground rent multiplier was
10 appropriate to this type of development.

11 Q. Well, I thought that the value
12 determination is driven largely by the
13 highest and best use, not the current use
14 as a McDonald's.

15 A. I didn't state that it had
16 anything to do with McDonald's. I'm
17 saying that this assignment was informed
18 by the directions within the lease. The
19 other was not but recognizing the
20 development of the site I looked at, that
21 this was largely going to be a retail
22 component economically, the development of
23 the site would be driven by the retail
24 largely and concluded that the rent
25 multiplier for that under this premise

1 TENER

2 should be closer to the pure retail
3 development towards the 10 percent.

4 Q. I don't understand how the
5 language in the fair market value, the
6 language in the option rent addendum to
7 the lease changes that calculus. Can you
8 walk me through that because you said that
9 the initial assignment was not advised by
10 the definitions within the option rent
11 addendum. So let's talk about that. How
12 did the definitions in the option rent
13 addendum to the lease cause you to move
14 from a 6 percent rent value in August 2018
15 to an 8 percent in April 2019?

16 MR. KOH: Objection. Go ahead.

17 THE WITNESS: I'm not saying
18 that. I said it was twofold.

19 MR. WALSH: Let me just -- I'm
20 sorry.

21 MR. KOH: Go ahead.

22 THE WITNESS: Do you want to --

23 BY MR. WALSH:

24 Q. I guess -- so I understood your
25 answer but you're saying it's twofold so

1 TENER

2 what I'm trying to understand is first,
3 before we get to the second part, how does
4 that first part change or can you not
5 break it up like that? Is it really two
6 parts that go together?

7 MR. KOH: Objection. Go ahead.

8 THE WITNESS: I don't think I can
9 break it out cleanly for you but there
10 are impacts that are in the
11 terminology of the amendment, the
12 option agreement, that impact and
13 define what you should do.

14 BY MR. WALSH:

15 Q. Can you give me an example?

16 A. No. The words are there. It
17 tells you to use certain approaches. It
18 tells you to value land, then use a -- it
19 tells you a definition of fair market
20 rental. None of these specifics were I
21 believe informed in the earlier appraisal.

22 Q. Well, but you use the sales
23 comparison approach in August 2018; right?

24 A. Yes.

25 Q. And you use the sales comparison

1 TENER

2 approach in April 2019; right?

3 A. Yes, sir.

4 Q. So your approach didn't change
5 based upon the language in the option rent
6 addendum, you use the same exact approach;
7 right?

8 A. Same approach to value.

9 Q. Okay. And so that didn't change.
10 What else in the option rent addendum
11 caused you to move from a 6 percent to an
12 8 percent?

13 A. I'm not saying that anything in
14 the option rent addendum told -- what I'm
15 saying is that within the second appraisal
16 you are informed by the directions within
17 the option rent. What changes is the
18 first market conditions have changed,
19 movement towards an M-Crown rezoning has
20 changed, the comparables we analyzed
21 changed. All of these inform what's
22 happening in the market. Secondly, what's
23 changed is that I recognize that the
24 majority of this development would be
25 towards retail based on its current land

1 TENER

2 value, recognizing that, recognizing the
3 public's awareness of the pending zoning
4 changes, all of these things impact market
5 opinions, market value, and in my opinion,
6 based on the concluded land values as of
7 '19, at that point in time, a tenant would
8 have had to pay 8 percent of that land
9 value at that time. At the prior one
10 under the subtle differences not defined
11 within the option rent agreement and where
12 they were relevant to M-Crown and the
13 sales and lease comparables going on in
14 the market at that point, my conclusion
15 was that it would have been 6 percent they
16 would have had to have paid. The market
17 continued to evolve and change and have
18 appreciation, have value.

19 Q. Okay. You said the market
20 continued to evolve and change but you
21 didn't add any new ground rent resets to
22 your analysis, right, it was the same
23 exact rule that you used in August 2018?

24 A. Yes, sir.

25 Q. So actually if we could turn to

1 TENER

2 that. It's ground rent resets tab at P73.

3 Do you see it?

4 A. Yes.

5 Q. So there are 39 ground leases
6 identified in this spreadsheet. Do you
7 see them, numbered 1 through 39?

8 A. Yes, sir.

9 Q. For each of those ground leases,
10 you list a borough, you have a date, a
11 use, a percent land value and you also
12 have some comments and for three of them,
13 numbers 24 through 26, they don't have a
14 borough listed.

15 Do you see that?

16 A. Yes.

17 Q. And there is no other data in
18 here in your spreadsheet other than about
19 these ground rents -- about these ground
20 leases other than what's in this tab of
21 the spreadsheet; right?

22 A. Yes, sir.

23 MR. KOH: Sorry, are we on P73?

24 MR. WALSH: P73, ground rent
25 resets tab.

1 TENER

2 BY MR. WALSH:

3 Q. Have you reviewed --

4 MR. KOH: Where? I'm not seeing
5 that yet. I'm seeing tabs that run
6 from site area, tax, land sale grid.

7 MR. WALSH: You've got to keep
8 going to the right.

9 THE WITNESS: It's after AMI to
10 MKT.

11 MR. KOH: Yeah, I'm trying to get
12 to that.

13 THE WITNESS: The slide on the
14 bottom.

15 MR. KOH: I've done that. Maybe
16 if I switch to a horizontal view, it
17 will give me enough room to see that.
18 There it is. Thank you. I just had
19 to switch the view. Go ahead.

20 BY MR. WALSH:

21 Q. So have you reviewed all of the
22 actual ground leases that are reflected in
23 this spreadsheet?

24 A. No, I have not. These were part
25 of the assignment, many of these were part

1 TENER

2 of the assignment that were performed by
3 Theresa Nygard reviewing -- some of them
4 were assignments that she worked on. She
5 worked on an analysis of the economics of
6 ground rent resets. I also had access to
7 the ground rent reset terms from a Cushman
8 & Wakefield report that we reviewed that
9 summarized the ground rent resets and what
10 the property's uses were. So it was a
11 combination of the assignment by Theresa
12 Nygard and some of these other reports
13 that we reviewed.

14 Q. So have you reviewed any of these
15 ground leases?

16 A. Yes.

17 Q. How many of them?

18 A. I don't know offhand.

19 Q. More than five?

20 A. It's possible.

21 Q. Which ones?

22 A. I can't tell you from this table.

23 Q. Okay. If I asked you to produce
24 all these leases, could you do that?

25 A. I don't know. Some of them were

1 TENER

2 under confidentiality but I did not -- I'm
3 telling you that the majority of this
4 assignment was from assignments that
5 Theresa worked on, the ground rent resets
6 and so they are all in our files. Whether
7 I have read them all or not, I doubt that
8 I've read them all but I am certain that I
9 have read several of them.

10 Q. Several of the 39?

11 A. Yes, sir.

12 Q. Okay. But you are confident that
13 all of these 39 leases are somewhere in
14 your office?

15 A. No, I'm not confident that all of
16 them. I can tell you that the C&W reports
17 are just summary of the provisions of the
18 rent resets.

19 Q. What, if anything, did you do to
20 verify the accuracy of the data contained
21 in this tab of the spreadsheet?

22 A. I looked at the work performed by
23 a co-worker who I trust and am confident
24 in her ability. I can't tell you I did
25 anything more than look at the summarized

1 TENER

2 provisions of these rent resets.

3 Q. Okay. So you didn't do anything
4 to verify the accuracy of the data
5 contained in this tab of the spreadsheet;
6 right?

7 MR. KOH: Objection.

8 THE WITNESS: Some of them I have
9 personal knowledge of, others I have
10 had access to reliable verification by
11 one of my employees.

12 BY MR. WALSH:

13 Q. Okay. You didn't personally do
14 anything though, right, to verify the
15 data?

16 MR. KOH: Objection.

17 THE WITNESS: I'm not saying --
18 that's not true. Some of them I have.

19 BY MR. WALSH:

20 Q. So what did you do?

21 A. Please --

22 Q. I'm just wondering, I'm asking
23 what did you do to verify the data in this
24 report personally, not aside from relying
25 on other people, what did you do to verify

1 TENER

2 that the accuracy of the data in this tab
3 of the spreadsheet titled ground rent
4 resets?

5 A. Several of them I have read. The
6 ones that I have not read I relied on my
7 employees. And the other, the C&W one, I
8 just took the reported data from a report
9 that we reviewed and assumed that it was
10 accurate.

11 Q. Okay. And you didn't actually
12 talk to Theresa to make sure that it was
13 all for the same purpose, did you?

14 A. I spoke to Theresa about this
15 assignment, her original assignment. I
16 knew that the purpose of her original
17 assignment was and am familiar with what
18 she did to complete the assignment. I
19 have no reason to think that her data is
20 not accurate.

21 Q. Did you talk with Theresa about
22 this assignment or this particular aspect
23 of your assignment and how you'd be using
24 her data?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: It's not her data.
3 It's our company data and it belongs
4 to the client in terms of the end work
5 product. I did speak to her about
6 this assignment and what I was hoping
7 to document in the market and have no
8 issues with its -- with the relevance
9 to what I put in there.

10 BY MR. WALSH:

11 Q. So 10 of these 39 leases date
12 back to the 1950s, nine of the 39 leases
13 date back to the 1960s. How did you
14 verify that leases that were that old
15 still had relevance to a market rent reset
16 being performed in 2019?

17 A. These rent resets or these rent
18 multipliers are based on their current
19 rent resets. They are for recent resets
20 so these are occurring in the last 10
21 years, the rent resets. That is the best
22 information that we have. It's negotiated
23 ratios of land value to future rent
24 determinations of generally 20 years is
25 most typical for the rent resets. I found

1 TENER

2 this to be the best available comparable
3 data that I could find.

4 Q. So what is in KTR's files that
5 would show -- for example, we're looking
6 at -- I'm looking at number 1. It says
7 Manhattan, date 1955, use office. Where
8 would I look to confirm that that 5
9 percent number was accurate and when it
10 was negotiated?

11 A. The backup data for Theresa's
12 report.

13 Q. But you didn't do that as part of
14 this analysis?

15 A. As I said, I trust that
16 employee's ability who is also an expert
17 witness to do this work credibly and I
18 have no doubt that it accurately reflects
19 information that she reported.

20 Q. On the bottom of this spreadsheet
21 of this tab in the spreadsheet, rows 46
22 through 49, you have some years. I'm just
23 trying to understand. It says 1950
24 minimum 4.5 percent, 2012 maximum 10
25 percent, 1969.5 median 6 percent, 1973

1 TENER

2 average 6.5 percent.

3 What do those years and numbers
4 reflect?

5 A. Just the years that the leases
6 were originally signed.

7 Q. Now, you just testified that the
8 reason this data is all relevant is
9 because these all reflect rent resets that
10 happened in the past 20 years. So why did
11 you summarize the years in this other
12 portion of the spreadsheet?

13 A. My own knowledge of when --

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: Just for my own
16 knowledge of when these occurred.

17 BY MR. WALSH:

18 Q. When what occurred?

19 A. When the original lease was
20 signed.

21 Q. What relevance does that have to
22 your analysis?

23 A. I want to know whether I had
24 recent lease comparables from which to
25 derive current rents. The most recent one

1 TENER

2 that I had was 2012 which was a
3 residential development in Manhattan on
4 23rd Street.

5 Q. But you just testified that all
6 of these, regardless of the year that's
7 listed in column C, were negotiated in the
8 past 20 years. Is that not accurate?

9 A. No --

10 MR. KOH: Objection. That's not
11 what he said.

12 THE WITNESS: That's not what I
13 testified to.

14 BY MR. WALSH:

15 Q. Okay, so can you clarify because
16 that was my impression of what you were
17 testifying to.

18 A. It's an incorrect impression.
19 The -- what I said or if I misstated, I
20 will clarify now, is that these were all
21 leases that were signed as indicated in
22 that table. They all have periodic rent
23 resets. These rent resets have occurred
24 within the last 20 years.

25 Q. I see. But the percent of the

1 TENER

2 reset would have been negotiated or could
3 have been negotiated in the year listed in
4 column C; is that correct?

5 A. Yes, sir.

6 Q. So for number 1, Manhattan date
7 1955, that 5 percent that you used to
8 determine a market rent reset in 2019 was
9 negotiated in 1955?

10 A. Well, it was part of the data
11 set. It wasn't negotiated in 1955 but it
12 was part of the data set.

13 Q. So when was it negotiated?

14 A. I said 1955.

15 Q. Okay. And so you believe that a
16 rate negotiated 64 years before this rent
17 reset is relevant and reliable to
18 determine what the current market value of
19 this ground lease should be?

20 A. I believe that the pool of ground
21 rent multipliers that I looked at
22 regardless -- I wouldn't say regardless,
23 but the pool that I looked at is reliable
24 to set a current and informs the rates
25 that would be accepted in the market.

1 TENER

2 Q. Now, do you agree that the
3 percentage of land value for a particular
4 ground lease reflects the percentage that
5 an investor would expect to get from its
6 purchase of the property?

7 MR. KOH: Objection. Go ahead.

8 THE WITNESS: I think it has some
9 bearing on the purchase but most of
10 the time, ground leases are negotiated
11 because the owner of the fee does not
12 want to sell the asset and wants to
13 control it in perpetuity.

14 BY MR. WALSH:

15 Q. But the percentage of the value
16 that they negotiate, that is essentially
17 their return on investment; right?

18 A. It is the --

19 MR. KOH: Objection.

20 THE WITNESS: It is a negotiated
21 return.

22 BY MR. WALSH:

23 Q. Okay. And that doesn't change
24 over time, what investors expect as a
25 return on their investments?

1 TENER

2 A. It certainly can.

3 Q. Okay.

4 MR. KOH: Brendan, we've been
5 going about an hour and a half.

6 MR. WALSH: We can take a break
7 now.

8 THE VIDEOGRAPHER: Thank you.
9 The time is approximately 2:20. We're
10 going off the record. This is the end
11 of media 3.

12 (Recess taken from 2:20 p.m. to
13 2:32 p.m.)

14 THE VIDEOGRAPHER: The time is
15 approximately 2:32. We're back on the
16 record. This is the beginning of
17 media 4.

18 BY MR. WALSH:

19 Q. Mr. Tener, referring back to your
20 April 15, 2019 report, which is Exhibit
21 P32, looking at the bottom of page 3, it's
22 the page ending in Bates stamp 1943. The
23 bottom paragraph, you wrote, "Additional
24 factors influencing this rate would
25 include the significant increase in land

1 TENER

2 value that would likely occur should the
3 proposed M-Crown rezoning be approved in a
4 manner that is consistent with that
5 currently being considered. Based on the
6 most recent presentation (as of the
7 February 7, 2019 meeting), the subject's
8 maximum developable area would increase to
9 approximately 170,500 square feet of ZFA
10 and would include an affordable housing
11 component. Although the timing and
12 certainty of this rezoning is unknown, it
13 is a factor that a well-informed landlord
14 would consider in determining the fair
15 market rental value."

16 Do you see that?

17 A. I do, sir.

18 Q. Would this same assumption hold
19 true if you had considered the encumbrance
20 of the 20-year McDonald's lease in your
21 valuation in April 2019?

22 A. What date, in April 2019?

23 Q. Correct.

24 A. This is not an assumption. What
25 appraisers are required to do is to

1 TENER

2 consider pending zoning changes. It's
3 actually in USPAP standard 1.3, and their
4 impact potential impact on value. An
5 example, if a landlord is considering
6 encumbering a property with a 20-year
7 lease to give away control of a property
8 to a tenant for 20 years and there's a
9 chance that the zoning on that property
10 will change in the next two, three, four
11 or five years or during that 20-year
12 period, it's going to impact the return or
13 the rate that a landlord would accept to
14 give up control of an asset that could
15 materially change in value during the
16 lease term.

17 Q. Okay. But here Vanderbilt had
18 already given up control of the property;
19 right? So McDonald's already had a lease
20 that ran through April 2039; right?

21 A. There is a lease on the property,
22 yes.

23 Q. So McDonald's already had control
24 of the property; right? So the only
25 question is what price should McDonald's

1 TENER

2 pay for the first five-year term and for
3 the three option terms after that; right?

4 A. I don't think it's McDonald's. I
5 don't think the lease says what this
6 tenant would pay.

7 Q. What the fair market value is for
8 the next five years and then up to 20
9 years, right, because of the 20-year term?

10 A. The tenant would control this
11 property for 20 years for a fair market
12 rental value as the price an average
13 well-informed tenant would pay and an
14 average well-informed landlord would
15 accept, exclusive of tenant's improvements
16 knowing all uses to which the property can
17 be put without duress on either party.
18 That's the direction within the lease
19 documents.

20 Q. And it's the uses to which the
21 property could be put for the next 20
22 years; right?

23 A. We have now determined that based
24 on the Second Avenue, yes.

25 Q. Right. So if the question is the

1 TENER

2 uses to which the property could be put
3 for the next 20 years, could the zoning
4 envisioned by the M-Crown rezoning, could
5 the property be developed in a manner
6 consistent with M-Crown for only a period
7 of 20 years?

8 A. That would not be my conclusion
9 that you could do that. What I'm saying
10 is that the landlord would be giving up
11 control for 20 years at which point in
12 time during that 20-year period the tenant
13 would have control over an asset that
14 would change materially in value, and
15 that's going to inform a well-informed
16 landlord decision about the rate that
17 would be appropriate to the fair market
18 rental value.

19 Q. Okay. So it's your professional
20 opinion that a landlord can consider --
21 I'm sorry, strike that.

22 It's your opinion that Vanderbilt
23 can consider a change in zoning in
24 determining the rent that McDonald's would
25 pay for the next 20 years?

1 TENER

2 MR. KOH: Objection. Go ahead.

3 THE WITNESS: That Vanderbilt
4 will?

5 BY MR. WALSH:

6 Q. Right. That Vanderbilt is
7 entitled to consider the possibility of a
8 change in zoning in deciding what rent to
9 charge McDonald's for the next 20 years.

10 A. That's not my testimony at all.

11 Q. Okay.

12 But you're saying that they would
13 be allowed to consider that in deciding
14 what to charge McDonald's; right? How are
15 the two different?

16 A. What I'm saying is that a fair
17 market rental value as directed within
18 this lease says that what a well-informed
19 tenant would pay and a well-informed
20 landlord would accept, a well-informed
21 landlord in determining what they would
22 accept would be aware of changes to zoning
23 that would materially change the value of
24 their property that they are giving up for
25 20 years and it would inform the rate they

1 TENER

2 would require or the rent that they would
3 require. If you had a property on Park --
4 or Central Park South and Fifth Avenue
5 that was zoned 1 FAR and you could only
6 put a car wash on it and it was going to
7 be rezoned to an 18 FAR or they were
8 talking about it, do you think a landlord
9 would be informed by that pending decision
10 in deciding what they would accept for
11 rent for the property? The answer I will
12 give you is yes and it's a requirement of
13 appraisers to consider that under USPAP.

14 Q. Doesn't the 936 Second Avenue
15 case say that zoning is an encumbrance?

16 MR. KOH: Objection. Go ahead.

17 THE WITNESS: I don't know.

18 BY MR. WALSH:

19 Q. So you're not aware if the
20 936 Second Avenue case requires appraisers
21 to consider only current zoning in a
22 situation like this?

23 MR. KOH: Objection. Go ahead.

24 THE WITNESS: I've not been
25 informed that that is the ruling. I

1 TENER

2 know that I am appraising it under
3 this zoning and I am appraising it
4 under a requirement that the fair
5 market rental value be determined by
6 well-informed tenants and landlords
7 and that while I do not -- I do not
8 deem to appraise it based on a change
9 in zoning, I am saying that the zoning
10 is in effect, I am not appraising it
11 under a different zoning. I am saying
12 that the potential for a zoning change
13 would impact the return requirements
14 of the landlord in determining whether
15 they will give away the right to use a
16 property for a 20-year period. That
17 is the requirement. I do not think
18 that the decision you're talking about
19 speaks to that part of appraisal.

20 MR. WALSH: If we could turn to
21 page 5 of your report, it's the page
22 ending in 1945, certificate of
23 appraisal.

24 MR. KOH: What exhibit number is
25 this? I'm sorry.

1 TENER

2 MR. WALSH: It's still P32. It's
3 the April 2019 report.

4 MR. KOH: I've got it.

5 BY MR. WALSH:

6 Q. The very bottom certification,
7 you wrote, "Other than preliminary
8 investigation and analysis in conjunction
9 with this appraisal assignment, we have
10 not appraised or provided any other
11 services with respect to the subject
12 property, as appraisers or in any other
13 capacity, in the last three years."

14 Now this is a disclosure required
15 by the ethical rules of USPAP; right?

16 A. Yes.

17 Q. And as a licensed appraiser in
18 New York, you're bound by USPAP; right?

19 A. Yes, sir.

20 Q. Is this an accurate statement?

21 A. This is referring to the -- yes,
22 it is. It's referring to the statements
23 -- to the appraisals that we did for Sam
24 Rottenberg relative to this, what evolved
25 into this assignment.

1 TENER

2 Q. But that was under a different
3 engagement letter from a different firm;
4 right?

5 A. Yes.

6 MR. KOH: Objection. Go ahead.

7 THE WITNESS: It wasn't for
8 Wachtel Missry, it was for his client.

9 BY MR. WALSH:

10 Q. And it had nothing to do with the
11 fair market rental valuation process in
12 the option rent addendum to the lease;
13 right?

14 MR. KOH: Objection. Go ahead.

15 THE WITNESS: I don't know
16 whether it did or not. Could it be
17 clearer? Yes, but the intent was to
18 inform that we had done that work.

19 BY MR. WALSH:

20 Q. So you consider the August 2018
21 appraisal preliminary and investigation
22 and analysis in connection with this
23 appraisal assignment?

24 A. Sitting here at this point,
25 that's what it feels like to me, that I

1 TENER

2 was engaged by them, by Sam Rottenberg's
3 group and through all of his actions, it
4 appears like this was a audition for this
5 eventual rent decision, that's why we
6 phrased it this way, it felt like this was
7 all part of leading up to it even though I
8 was not fully aware of it at the time.

9 Q. Is it common practice for
10 appraisers to ask associates or even
11 competitors for assistance in gathering
12 market data for a particular assignment?

13 A. Yes, sir.

14 Q. So, for example, you got
15 information from Theresa Nygard that you
16 used in this assignment; right?

17 A. Yes, sir.

18 Q. And you also relied on data from
19 Cushman & Wakefield; right?

20 A. Yes, sir.

21 Q. Can you show me any
22 correspondence anywhere with any other
23 appraisers asking for assistance in
24 finding potential ground lease comps for a
25 period of under 49 years?

1 TENER

2 A. I didn't reach out to anybody
3 looking for that.

4 Q. Did you reach out to any
5 colleagues?

6 A. I spoke to Theresa who is my
7 expert in ground leases. Neither one of
8 us could think of anyone but no, I did not
9 go out and ask other appraisers if they
10 had 20-year ground leases that were
11 recently signed or any ground leases that
12 were signed.

13 Q. And you also did not reach out to
14 any brokers?

15 A. No, I did not.

16 Q. No landlords or developers?

17 A. No, sir.

18 Q. Okay. So after you issued your
19 report in April -- on April 15, 2019, do
20 you recall what was the next thing that
21 happened in the fair market rental
22 valuation process for this lease?

23 A. I believe that we had a -- I'm
24 not sure if the next step was naming the
25 other -- naming the third-party appraiser.

1 TENER

2 I forget the sequence.

3 Q. So do you recall when you found
4 out that Sharon Locatell was serving as
5 McDonald's appraiser?

6 A. What I was inarticulately saying
7 is that I don't really recall the
8 sequence.

9 Q. You knew Sharon before this
10 assignment; right?

11 A. Yes, sir.

12 Q. What is Sharon's reputation in
13 the appraisal community?

14 A. I would rather not speak to her
15 reputation.

16 Q. Well, I'm asking you that
17 question and I would like an answer.

18 A. She's an MAI that's active in
19 litigation, that's her reputation.

20 Q. Why are you uncomfortable
21 answering that question?

22 A. Because I don't think that I need
23 to speak about reputation. I think I'd
24 rather be matter of fact.

25 Q. Do you believe she's a competent

1 TENER

2 appraiser?

3 A. I would prefer to not answer that
4 question.

5 Q. My question is do you believe she
6 is a competent appraiser, yes or no?

7 A. She's a designated appraiser.
8 She has -- she has all of the licenses and
9 she's an MAI and so I'll let her -- we'll
10 let her credentials speak for themselves.

11 Q. Someone with those credentials
12 must be a competent appraiser though;
13 right?

14 A. No, sir.

15 Q. You have those credentials
16 though, don't you?

17 A. I'm an MAI, sir.

18 MR. WALSH: Okay. If we could
19 look at P37, please.

20 VERITEXT CONCIERGE: P37 is now
21 being copied over.

22 BY MR. WALSH:

23 Q. If you could look at I guess it's
24 pages 3 and 4.

25 A. I'm not seeing it yet.

1 TENER

2 Pages 3 and 4?

3 Q. Actually let's look at page 1,
4 I'm sorry. The page ending in 026 which I
5 guess is page 2. There's an April 23,
6 2019 e-mail on the bottom of the page.
7 It's from you to Morris Missry.

8 Do you see that?

9 A. At the bottom?

10 Q. Yeah.

11 A. Yes.

12 Q. And you wrote, "I will be
13 speaking with Sharon Locatell tomorrow at
14 10 a.m. to go over the logistics of this
15 FMR determination and to begin the
16 discussion about the selection of the
17 third appraiser. Please send me the list
18 of appraisers that Sam has spoken with
19 about this property. Besides Amanda Aaron
20 are there any appraisers that you do not
21 want to be considered. Thanks."

22 What appraisers did Morris tell
23 you should not be considered? It looks
24 like he told you not to consider Amanda
25 Aaron?

1 TENER

2 A. I think so but based on this
3 communication.

4 Q. Do you recall why?

5 A. No, I don't.

6 Q. Do you recall if he told you any
7 other appraisers that you shouldn't
8 consider?

9 A. I don't recall.

10 Q. And did he give you a list of
11 appraisers that Sam has spoken with about
12 the property?

13 A. I don't recall.

14 Q. Okay. Looking at the first page,
15 there's some correspondence back and forth
16 with you and on April 25th, you wrote,
17 "Morris and Sam, I am also considering
18 Kevin Leprohon at Blake (he is
19 Christophe's partner). Any conflict?"
20 Morris Missry responded that same day,
21 "No, you know what we're looking for."

22 What was Morris Missry looking
23 for in a third appraiser?

24 A. I think he was looking for
25 someone that was knowledgeable of the

1 TENER

2 Brooklyn market and would understand
3 ground leases.

4 Q. Was there anything else he was
5 looking for?

6 A. Not that I know of.

7 Q. What else do you remember about
8 that process and what Morris told you?

9 A. Not what Morris told me. In
10 general you're looking for appraisers that
11 don't have any conflicts. That's really
12 what I was trying to add.

13 Q. Okay. Were you feeling pressured
14 at this time to get a third appraiser in
15 place?

16 A. Not pressured but there was a
17 timeline that I believe that we were
18 trying to move this forward on. I'm not
19 sure if it was specified in this lease or
20 not. Some of the leases specify a time
21 frame where you have to have the third by.

22 MR. WALSH: If we can mark
23 VA 001592.

24 (Exhibit P74, document Bates
25 labeled VA 001592, marked for

1 TENER

2 identification.)

3 VERITEXT CONCIERGE: This we'll
4 mark as Exhibit P74.

5 BY MR. WALSH:

6 Q. If you could look to the bottom
7 of the second page, it's the page ending
8 in 1593.

9 A. 1593, I'm there, sir.

10 Q. So this is an e-mail from you to
11 Morris Missry and Sam Rottenberg on April
12 25, 2019. And at the bottom of page 2 you
13 wrote, "She seems to think that we will
14 meet with the 3rd appraiser and try to
15 convince the 3rd that our MVS are correct,
16 prior to the 3rd appraiser authoring a
17 report." On the next page you say, "What
18 is your take on the procedure outlined in
19 the option rent addendum?"

20 Do you see that?

21 A. I do, sir.

22 Q. So how did you respond when
23 Sharon brought that up to you during your
24 call with her?

25 MR. KOH: Objection. Go ahead.

1 TENER

2 THE WITNESS: I don't recall what
3 I said to her. I actually don't
4 remember what the conversation was.
5 This is a summation of that -- of her
6 opinion of it. I don't recall what I
7 said to her.

8 BY MR. WALSH:

9 Q. And you asked Morris Missry for
10 advice; right?

11 A. I was asking for an
12 interpretation of the appraisal proceeding
13 of how we were supposed to move forward
14 and how the appraisal proceeding was
15 supposed to occur.

16 Q. And then Morris responded and
17 asked if you were available for a quick
18 call with him and Sam Rottenberg; right?

19 A. Yes, sir.

20 Q. And do you recall that call?

21 A. No, sir.

22 Q. Okay. And what do you recall
23 about the instructions Morris Missry gave
24 you about Vanderbilt's position on the
25 role of the third appraiser?

1 TENER

2 A. I think there was a belief that
3 the rent option addendum directed us to
4 exchange letters of value that didn't make
5 a provision for what Sharon was asking for
6 which was basically a -- almost an
7 arbitration where we would be presenting
8 data to the -- or presenting our case to a
9 third appraiser prior to him ever -- that
10 third appraiser which happened to be Marc
11 Nakleh who we agreed upon, to before that
12 appraiser would write their own appraisal
13 letter of opinion which appeared to be in
14 conflict with the directions of the option
15 rent addendum.

16 Q. So did you agree with Morris that
17 the parties' appraiser should not be
18 allowed to have discussions with the third
19 appraiser?

20 MR. KOH: Objection. You may
21 answer.

22 THE WITNESS: I don't know
23 whether discussions as opposed to a
24 hearing. Really what Sharon was
25 suggesting is that almost like before

1 TENER

2 the third appraiser ever wrote their
3 letter of opinion that there would be
4 this exchange of almost our case, our
5 position on this valuation. I was
6 under -- my reading of the rent option
7 addendum didn't jive with Sharon's
8 reading of it. I thought that we were
9 supposed to exchange letters of value,
10 letter opinions of value, the three of
11 us and compare the results, and if
12 there was agreement between two, they
13 would prevail. If there was not, it
14 would be an average of the three
15 reports. I took on this assignment
16 believing that it was a simple
17 exchange of values and not a
18 full-fledged arbitration.

19 BY MR. WALSH:

20 Q. Okay. So that was your view.
21 What view did Morris and Sam tell you to
22 take?

23 MR. KOH: Objection.

24 THE WITNESS: Sam didn't tell me
25 anything that I recall. I think

1 TENER

2 Morris was of the opinion that it was
3 supposed to be a simple exchange, that
4 it was more in line with my
5 understanding.

6 BY MR. WALSH:

7 Q. Did Morris ever suggest that not
8 having discussions with a third appraiser
9 was more likely to result in the averaging
10 of the three appraisals?

11 MR. KOH: Objection. Go ahead.

12 THE WITNESS: I don't recall that
13 being a discussion point. It was a
14 discussion point of what does the rent
15 addendum tell us to do.

16 BY MR. WALSH:

17 Q. But did he ever suggest that his
18 approach was more likely to result in an
19 averaging?

20 A. I don't recall that.

21 Q. Did Morris or Sam ever express a
22 desire to you that your valuation be
23 averaged with the other two valuations?

24 A. A desire, no, I don't think so.

25 Q. Well, how would you describe it?

1 TENER

2 A. That because there was a
3 significant difference and this would have
4 been -- so we're jumping ahead. This is
5 after our exchange that there was a
6 significant difference between us that it
7 wouldn't be likely that we would have
8 agreement. That's about it.

9 MR. WALSH: If we could pull up
10 P38, please.

11 BY MR. WALSH:

12 Q. Okay, the bottom e-mail is an
13 e-mail from you to Sam Rottenberg and
14 Morris Missry on May 6th and you wrote,
15 "Guys, I haven't spoken with Sharon yet;
16 however, I am considering including Marc
17 Nakleh of C&W on my extended list."
18 Morris responded a few minutes later and
19 asked you why and then you responded a few
20 minutes later and said, "I reviewed one of
21 his appraisal reports that he did for
22 Brian Corcoran that detailed numerous
23 ground land percentages relative to land
24 value. I will remind him of this data
25 that he has available in his files. Some

1 TENER

2 of this data is noted in my report and is
3 supportive of a high percentage in the
4 estimation of FMR."

5 Do you see that?

6 A. Yes, sir.

7 Q. So earlier you testified that
8 what you were looking for in an appraiser
9 was someone who knew Brooklyn and someone
10 who didn't have a conflict, but here
11 you're indicating a preference for
12 somebody who has data that is supportive
13 of a high percentage in the estimation of
14 FMR; right?

15 A. I think that the intent was
16 because I had gone towards the high end of
17 the range that I would remind this
18 appraiser, if he was the one selected, of
19 the data that I had available that he was
20 knowledgeable of.

21 Q. How would you remind him of that
22 data? Because you were envisioning a
23 process where there was no discussions and
24 Morris was considering more of an
25 exchange. So how would you have reminded

1 TENER

2 him of that data?

3 MR. KOH: Objection. That's not
4 what he testified to. Go ahead.

5 THE WITNESS: I don't know
6 exactly what level of communication
7 there would be between the three
8 appraisers. What I had said was that
9 I did not envision this being a
10 arbitration where we're presenting our
11 case to the third where he wrote an
12 appraisal, but I didn't think it would
13 be in a complete vacuum. I just
14 didn't think it would be the way
15 Sharon described it, that she
16 envisioned this almost hearing and
17 presentation of our cases to Marc
18 Nakleh before he even wrote his letter
19 opinion of value. I didn't think that
20 was consistent with the direction the
21 option rent addendum went.

22 BY MR. WALSH:

23 Q. Did Morris think that it should
24 be done in a vacuum?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: I don't know
3 whether he did or not but I think they
4 did not agree with the premise taken
5 by Ms. Locatell.

6 BY MR. WALSH:

7 Q. And just to be clear, the data
8 that you said in this e-mail is noted in
9 your report, those were the C&W entries in
10 the ground rent reset tab of that
11 spreadsheet we looked at earlier; right?

12 A. Yes, sir.

13 MR. WALSH: Okay. So if we could
14 mark MCD002701.

15 (Exhibit P75, document Bates
16 labeled MCD002701, marked for
17 identification.)

18 VERITEXT CONCIERGE: This is
19 being introduced as P75.

20 BY MR. WALSH:

21 Q. This is an e-mail from Sharon
22 Locatell to Carol Demarco. I'm just
23 telling you it's an e-mail from Sharon
24 Locatell to Carol Demarco and Mike Meyer
25 on Thursday, May 9th. If you could just

1 TENER

2 read that e-mail and let me know when
3 you've read it.

4 A. (Witness perusing document.)
5 I've read it.

6 Q. Is Sharon's summary of what she
7 interpreted her position as, is that
8 consistent with the position that you took
9 during your meeting?

10 A. I don't think it's a hundred
11 percent accurate and I recall her not
12 wanting to call Marc, not the other way
13 around. So I think she has
14 miscommunicated that portion of it.
15 The -- I'm not sure why. I'm not quite
16 sure what she's saying as I thought he
17 read the lease to say, which means that
18 she had a concern about how I read the
19 lease and maybe she read the lease in a
20 certain way, to say that we all have to
21 come to the initial meeting of the letter
22 opinion of value. So that's consistent
23 that I thought that the three appraisers
24 would write their letter opinion of
25 values, we would exchange that, if we

1 TENER

2 couldn't come to an agreement of value
3 that then the three would be averaged.
4 That is how I read this. She words it a
5 little bit differently but yes, that was
6 closely consistent with my interpretation
7 and what we discussed.

8 MR. WALSH: Okay. If we could
9 mark VA 000408.

10 (Exhibit P76, document Bates
11 labeled VA 000408, marked for
12 identification.)

13 VERITEXT CONCIERGE: This will be
14 introduced as P76.

15 BY MR. WALSH:

16 Q. So the e-mail we just looked at
17 indicated that you and Sharon had a call
18 about the process on May 9th and this
19 document indicates that you scheduled or
20 someone scheduled a telephone conference
21 between you, Morris Missry, Sam Rottenberg
22 and Tom Li the next day on May 10, 2019.

23 Do you see that?

24 A. It looks like I was the organizer
25 of it.

1 TENER

2 Q. And that meeting was to discuss
3 the instructions to be given to the third
4 appraiser; right?

5 A. I believe so.

6 Q. And Morris, Sam and Tom Li were
7 all at that meeting, right, or on that
8 call?

9 A. I don't recall if all attended.

10 Q. Okay. In your invoice for May
11 time, you wrote call with MM, SR, TL about
12 SL reading of instructions to appraisers.
13 If you put it in your time entries, it
14 would seem likely that they were all
15 there; right?

16 A. Yes, sir.

17 Q. Okay. And what do you remember
18 about that phone call?

19 A. I remember explaining her
20 position as best I could and pretty much
21 asking them how do we solve this because
22 Sharon didn't want to reach out to Marc
23 until we had this settled.

24 Q. What instructions did they give
25 you?

1 TENER

2 A. I don't recall but it's okay to
3 go forward with the way that she thinks
4 that it is read.

5 MR. WALSH: If we can mark
6 VA 001248.

7 (Exhibit P77, document Bates
8 labeled VA 001248, marked for
9 identification.)

10 VERITEXT CONCIERGE: This will be
11 marked as Exhibit P77.

12 THE WITNESS: It's up.

13 BY MR. WALSH:

14 Q. So you were exchanging e-mails
15 with Sam and Morris about this
16 disagreement on the process with the third
17 appraiser and the second e-mail on the
18 first page on May 14, 2019, you wrote to
19 Morris, "If the hope is to avoid
20 litigation and delay in the rent reset, I
21 might suggest that we propose having the
22 three appraisers review the directions and
23 see if two of us can agree. What do you
24 think?"

25 Do you see that?

1 TENER

2 A. Yes, sir.

3 Q. And Morris rejected that idea;
4 right?

5 MR. KOH: Objection.

6 THE WITNESS: He states, "The
7 lease provision is clear. I am
8 talking to them and will let you know
9 what happens. Thank you." That's all
10 he said. I don't know whether he
11 rejected that idea or not.

12 BY MR. WALSH:

13 Q. Did he ever accept that idea?

14 A. I don't know.

15 Q. Okay. Around this time you asked
16 Vanderbilt for a list of the owners and
17 ownership entities for the conflict check.
18 If we could mark P65.

19 VERITEXT CONCIERGE: P65 has been
20 copied.

21 THE WITNESS: I'm sorry, what is
22 the?

23 BY MR. WALSH:

24 Q. P65.

25 A. Oh, it's at the bottom. They are

1 TENER

2 not going in order at this point.

3 Q. And so Tom Li on May 21st sent
4 you a list of entities.

5 Do you see that?

6 A. Yes, sir.

7 Q. If we could now pull up P64.

8 VERITEXT CONCIERGE: P64 has been
9 copied.

10 BY MR. WALSH:

11 Q. Now, if you could look at P64.

12 A. Yes, sir.

13 Q. This is an e-mail that Tom only
14 sent internally to Sam Rottenberg before
15 he sent you the list that we just looked
16 at at P65 and there's a bunch of
17 additional names in here. Were you aware
18 that these other entities were involved in
19 some way in the ownership of this
20 property?

21 MR. KOH: Objection. Go ahead.

22 THE WITNESS: I don't think so.

23 BY MR. WALSH:

24 Q. Have you ever worked with Simon
25 Dushinsky before?

1 TENER

2 A. I don't know offhand.

3 Q. How about the Rabsky Group?

4 A. I don't know offhand. I would
5 have to check.

6 Q. Why was it important for you to
7 have the full list of all the owners that
8 had some sort of interest in this
9 property?

10 A. The conflict check is primarily
11 for me to inform the attorneys involved if
12 I have done work for other people so they
13 can decide whether I have potentially any
14 conflicts that would make them not want to
15 work with me. That's my understanding of
16 a conflict check. I'm looking to see have
17 I done work, do people think that I have
18 any relationship with any of these people,
19 do I have some business relationship with
20 them that would somehow preclude my
21 independence.

22 Q. And so it would have been
23 important for Marc to know all of the
24 ownership entities involved, right, in
25 order to understand whether he had some

1 TENER

2 sort of conflict?

3 MR. KOH: Objection.

4 THE WITNESS: This is from Marc.

5 So I misunderstood the nature of this
6 disclosure. You would want Marc to
7 know who these entities were to see if
8 they have any relationship with him,
9 Marc has any relationship to see if
10 his independence would be impacted.

11 BY MR. WALSH:

12 Q. So this is another instance where
13 you asked for information and Vanderbilt
14 either didn't give it to you or didn't
15 give you everything. Is it concerning to
16 see -- for example, you asked for the
17 McDonald's lease in August 2018, they
18 didn't give it to you. You asked for the
19 Vanderbilt lease in August 2018, they
20 didn't give it to you. You asked for the
21 Vanderbilt lease again in March of 2019,
22 they didn't give it to you. Now you're
23 asking for the names of the owners and
24 ownership entities and it appears at least
25 they only gave you partial information.

1 TENER

2 MR. KOH: Objection.

3 BY MR. WALSH:

4 Q. Does this give you pause about
5 what else they may have been holding back
6 from you?

7 MR. KOH: Objection. You may
8 answer.

9 THE WITNESS: I don't know if it
10 gives me pause. I would prefer to
11 have everything disclosed to me when I
12 ask for it. It's the way I do
13 business.

14 BY MR. WALSH:

15 Q. But you don't know what you don't
16 know unless they tell you; right?

17 A. That's right.

18 Q. So ultimately the parties and
19 appraisers scheduled a meeting for June
20 19, 2019 at Morris Missry's office; right?

21 A. Yes, sir.

22 MR. WALSH: If we could pull up
23 P34, please.

24 VERITEXT CONCIERGE: P34 is now
25 copied over.

1 TENER

2 BY MR. WALSH:

3 Q. It's handwritten notes. First of
4 all, did you take notes during that June
5 19, 2019 meeting?

6 A. Not that I saved. Not that I
7 have in my files.

8 Q. When would you have discarded
9 those notes?

10 A. Probably at the meeting. I
11 remember doing some calculations on my
12 HP12C of a basic residual. I don't know
13 whether I did it on paper or whether it
14 was all in my HP12C but that would have
15 been the extent of the notes that I took.

16 Q. So these are not your notes?

17 A. It's not my handwriting.

18 Q. Do you know whose handwriting it
19 is?

20 A. No.

21 Q. What did you understand the
22 purpose of the June 19, 2019 meeting to
23 be?

24 A. I thought it was so that we could
25 move forward with trying to determine the

1 TENER

2 procedures with a third appraiser. That's
3 what I thought the purpose was. I was
4 also asked to bring my initial appraisal
5 letter.

6 Q. In preparation for that meeting,
7 did you have conversations with Morris,
8 Sam or Tom Li about the encumbrance of the
9 lease, that issue, the 20-year term of the
10 lease not being considered in your initial
11 report?

12 A. I don't think leading up to that
13 meeting, I don't think I did.

14 Q. So after you had spoken with
15 Morris about that in early April 2019, you
16 don't recall any conversations about that
17 particular issue, meaning the 20-year term
18 of the lease, until after that June 19,
19 2019 meeting?

20 A. Actually at the meeting, Morris
21 said that he agreed with them, with that
22 the -- that the decision applied. That
23 was the first time I had heard that. I
24 don't recall having a conversation with
25 him before that. I remember being

1 TENER

2 surprised that he changed his opinion.

3 Q. And how did that come up, why did
4 he say that?

5 MR. KOH: Objection.

6 THE WITNESS: There was a
7 conversation between both sides
8 dealing with the lease term and I
9 think Sharon was saying it was a
10 five-year lease term and I think the
11 conversation went to 20 years and then
12 the conversation went to that
13 provision.

14 BY MR. WALSH:

15 Q. And so did McDonald's --
16 McDonald's objected at that meeting to
17 your failure to consider the 20-year term
18 of the lease; isn't that right?

19 MR. KOH: Objection.

20 THE WITNESS: I believe they made
21 a point about it.

22 BY MR. WALSH:

23 Q. And then you said that Morris
24 ultimately agreed with them at that
25 meeting?

1 TENER

2 A. I don't know if he agreed with
3 them but he stated that -- I don't want to
4 say stated but what I understood him to
5 communicate was that yes, the -- that part
6 of the provision of the Second Avenue
7 information would apply and that the lease
8 term needed to be considered.

9 Q. Okay. Was it a cordial meeting?

10 A. Some parts were cordial, some
11 parts were not.

12 Q. What parts were not?

13 A. I don't recall all of them but
14 there were parts where it was definitely
15 heated.

16 Q. Was Morris Missry the person who
17 was heated?

18 MR. KOH: Objection.

19 THE WITNESS: I think both sides
20 were heated.

21 BY MR. WALSH:

22 Q. Who on McDonald's side would you
23 say was heated?

24 MR. KOH: Same objection.

25 THE WITNESS: I don't recall

1 TENER

2 offhand but it definitely was not
3 the -- not overly -- I would say it
4 was not overly cordial.

5 BY MR. WALSH:

6 Q. Did you know in advance of that
7 meeting that you and Sharon had used
8 different approaches or methodologies to
9 arrive at the fair market rental value of
10 the property?

11 A. I don't think so.

12 Q. And you told Sharon that you
13 didn't believe the ground lease comps she
14 used were appropriate because they did not
15 consider all the uses to which the
16 property could be put; right?

17 A. I told her that they weren't
18 ground lease comps, that they were quick
19 service retail comps that did not consider
20 the highest and best use of the property.
21 They weren't ground lease comps. They
22 were rentals of small fast food
23 restaurants like McDonald's. It didn't
24 follow the directions of the lease.

25 Q. Well, the McDonald's lease,

1 TENER

2 that's a ground lease; right?

3 A. I believe it is a ground lease in
4 that McDonald's constructed the building,
5 yes.

6 Q. So what is the distinction you're
7 drawing between -- because you're saying
8 that these were only leases for quick
9 service restaurants. Why is that not a
10 ground lease?

11 A. Because the tenant rented the
12 building, not the land. They didn't
13 construct their building. Her leases are
14 all I believe of existing fast food
15 restaurants, at least in that initial
16 report, and certainly did not consider the
17 highest and best use of the property, all
18 the uses that could be put to the site.

19 Q. So would your view be different
20 if you learned that those tenants had
21 actually constructed the buildings that
22 were on those properties?

23 MR. KOH: Objection. Go ahead.

24 THE WITNESS: It would --

25 terminology wise, I would think it

1 TENER

2 would be a pad rental if the tenant
3 constructed it but I certainly would
4 not change my opinion that she did not
5 consider the highest and best use of
6 the subject property.

7 BY MR. WALSH:

8 Q. So they would be ground leases
9 but they would not be comparable in your
10 view because they didn't have the same
11 highest and best use; is that right?

12 A. They may or may not be comparable
13 if you analyze them based on the highest
14 and best use. She analyzed them based on
15 an annual rent per month or per year
16 regardless of what they could be developed
17 to or what the subject could be developed
18 to. So following that logic, if I had a
19 similar site on the corner of Park Avenue
20 and Fifth and it was rented as a fast food
21 restaurant, that would be the rent I
22 should pay for this. It was absurd.

23 Q. I want to go back to your dispute
24 that these are ground leases because you
25 testified earlier that you could not find

1 TENER

2 any ground leases that were under 49
3 years; right?

4 A. Developed at a highest and best
5 use, yes.

6 Q. So that's how -- so your
7 testimony is that there were ground leases
8 under 49 years but none of those developed
9 the properties to their highest and best
10 use?

11 MR. KOH: Objection.

12 THE WITNESS: I don't know if
13 there were ground leases of 20 years
14 developed at a highest and best use,
15 nor do I know if any of her
16 comparables were developed at the
17 highest and best use. That's not --
18 that was not explained within any of
19 her information and certainly when you
20 consider her analysis as a gross
21 dollar amount, it's impossible that
22 she considered it.

23 BY MR. WALSH:

24 Q. I'm not talking about that
25 analysis. I'm just talking about your

1 TENER

2 dispute that she didn't look at ground
3 leases.

4 A. It does not look like she looked
5 at ground leases. She looked at quick
6 service restaurants leases.

7 Q. But wouldn't those quick service
8 leases be ground leases if all they did
9 was rent the ground and then build a
10 restaurant on that ground?

11 MR. KOH: Objection. Go ahead.

12 THE WITNESS: Could one or two of
13 them been ground leases? She never
14 explained that, nor did she analyze
15 that. These are appraisal differences
16 that we would have addressed if this
17 had gone to the appropriate
18 arbitration or appraisal proceeding,
19 but because McDonald's wouldn't agree
20 to hire, even reach out to sign up
21 Marc Nakleh, we never got to that.

22 BY MR. WALSH:

23 Q. I thought -- didn't you testify
24 that you suggested that to Morris and he
25 didn't accept that?

1 TENER

2 MR. KOH: Objection.

3 THE WITNESS: I said that I
4 suggested it in that letter. I didn't
5 get a response.

6 BY MR. WALSH:

7 Q. Okay, so how do you know it was
8 McDonald's?

9 A. When I spoke with Sharon, she
10 refused to move forward. She said the
11 client doesn't agree with this. I asked
12 we should reach out, get our clients to
13 reach out to Marc and get an engagement
14 letter going so that we can proceed with
15 this. When I followed up with Morris
16 Missry about that, he informed me that
17 they wouldn't go forward because of a
18 disagreement in the procedure and that's
19 why that meeting of July 19th was being
20 scheduled to try to hash through that so
21 that we could go forward.

22 Q. So going back to Sharon's
23 analysis briefly, it's your position that
24 those were not ground leases that she was
25 looking at; is that right?

1 TENER

2 A. Certainly not all of them, that's
3 for sure.

4 Q. Okay. What did you do to
5 determine whether they were actually
6 ground leases or not as she said they were
7 in her report?

8 A. If I recall, I looked at when the
9 building was built, but I don't recall at
10 this point two and a half years later
11 everything I looked at.

12 Q. Okay. Now certainly some of the
13 ground leases that you looked at, those
14 buildings were built in the '50s and '60s;
15 right?

16 MR. KOH: Objection.

17 THE WITNESS: Yes, sir.

18 BY MR. WALSH:

19 Q. So why does the fact when a
20 building was built determine whether
21 something was a ground lease or not?

22 A. A ground lease by nature is a
23 lease to a user who will construct their
24 property or their building, their desired
25 building on the site. If the property is

1 TENER

2 improved and the tenant is leasing the
3 improved asset, that is not a ground
4 lease.

5 Q. But if the property is not
6 improved, then it is a ground lease;
7 right?

8 A. If the property --

9 MR. KOH: Objection.

10 THE WITNESS: If the property is
11 vacant?

12 BY MR. WALSH:

13 Q. Correct.

14 A. It would be either a ground lease
15 or it could be a -- the economics could be
16 similar to a storage arrangement where
17 you're only using it to park cars, store
18 equipment, things like that. Those again
19 are, if you want to have semantics, they
20 could be ground leases but they are not
21 ground leases in terms of the highest and
22 best use. They would be in premises.

23 Q. Okay. But when you looked at
24 Sharon's report, you didn't attempt to
25 determine whether the properties that she

1 TENER

2 had claimed were comparable were developed
3 to their highest and best use; right?

4 A. They certainly weren't highest
5 and best use consistent with our highest
6 and best use. The subject was highest and
7 best use. So even if they were consistent
8 with the highest and best use of that
9 particular site, the analysis had to
10 understand the differences between that
11 and the subject's highest and best use
12 which certainly was not communicated or
13 even suggested in Ms. Locatell's report.

14 Q. And in your April 2019 report you
15 concluded that the highest and best use
16 was a mix of both commercial and
17 residential; right?

18 A. Without the lease term, which?

19 Q. April 2019.

20 A. Yes.

21 Q. Who suggested the idea of
22 supplementing your report with a land
23 residual analysis?

24 A. I did, at that meeting.

25 Q. To who?

1 TENER

2 A. To Morris Missry and Sam
3 Rottenberg when we were in the breakout.

4 Q. And did you raise -- was that
5 issue raised with McDonald's during the
6 June 19, 2019 meeting?

7 A. I actually believe it was
8 discussed because I remember running the
9 map on the HP12C and got a rough
10 indication that the rents would be -- not
11 be dissimilar depending on what the costs
12 were to build a small retail development
13 there and the rents of the finished
14 product that you would have to adjust for
15 those costs over the 20-year period.

16 Q. So if -- with the information
17 that the 936 Second Avenue case should
18 have applied in this situation, and you
19 were required to consider the cumbrance of
20 the 20-year lease on the property, why
21 didn't you suggest completely redoing your
22 report as opposed to just supplementing it
23 with a new analysis?

24 A. The answer is twofold. One, as I
25 have testified already, I was not aware of

TENER

ground leases developed to their highest and best use that would be applicable to these recent ones, and that section would not necessarily need to be revised pending the findings of the land residual which in the rent option agreement, the appraisers are instructed to if adequate comparable leases are not available, then a land residual technique should be used. That was the -- for me, that was the defining direction within the option agreement. I had been under the conclusion and am still under the conclusion that adequate ground leases are not available that reflect the highest and best use of the site and as such, I was directed to utilize the land residual which I did.

Q. Okay. But in April 2019 you concluded that there were not adequate comparable leases because there were no leases that had this use for both residential and manufacturing; right?

A. Well, no. Prior to the lease term, I hadn't found recent ground leases

1 TENER

2 of properties developed to the highest and
3 best use. My research at the time had not
4 uncovered any recent ground leases
5 relative to that use in comparable
6 locations that would work. Not work, just
7 didn't find any.

8 In following the direction of the
9 lease back then, where it told me to solve
10 for the land value of the vacant land
11 under the standard market value, that
12 direction was telling me to do that as a
13 step and then to use market research to
14 determine the appropriate rent multiplier.
15 We still felt like that was the -- I still
16 felt like that was the instructions of the
17 option agreement.

18 The direction is to find the land
19 value, solve for the rent multiplier. If
20 there were recent ground leases from which
21 I could derive those rent multipliers
22 and/or rents, use them but I -- this is
23 the direction that I saw within the lease
24 and I followed it.

25 Q. So my understanding of part of

1 TENER

2 your concerns with Sharon's analysis is
3 that she did not use comparable leases
4 that considered all of the uses to the
5 property to which the property could be
6 put; is that accurate?

7 A. Can I look at the wording because
8 I'm not sure you got it straight?

9 Q. I guess we'll get to it in a
10 little bit but I guess I have understood
11 your concern with Sharon's analysis to be
12 something different than what you're
13 explaining now. My understanding was that
14 your disagreement with her was that she
15 did not consider comparable leases that
16 considered all of the uses to which this
17 property could be put.

18 A. That's accurate, that she did not
19 consider all uses to which the property
20 could be put as specified within the
21 lease. She is -- she treated it like this
22 property can only be a quick service
23 restaurant. Did not consider what even
24 minimally what this could be developed to.

25 Q. Okay. But what you're saying now

1 TENER

2 is that she didn't even use comparable
3 ground leases. That seemed to be what you
4 were saying 10 minutes ago.

5 MR. KOH: Objection.

6 THE WITNESS: You misunderstood.
7 I'll repeat it. She failed to
8 consider the highest and best use of
9 the site. That obviously informed her
10 selection of comparables. I think she
11 failed to analyze them. I think she
12 failed to apply them to the highest
13 and best use of the property as
14 directed within the option agreement.
15 I think she failed on many levels so
16 it's -- and it's obvious in the
17 significant difference between her
18 conclusion and ours that I am looking
19 at a highest and best use, she is
20 looking at an interim use.

21 BY MR. WALSH:

22 Q. When you say highest and best use
23 and interim use, in your first report, you
24 said that the highest and best use was
25 both residential and commercial; right?

1 TENER

2 A. Yes, sir.

3 Q. But that's not the highest and
4 best use over a 20-year term; right?

5 A. I concluded that it was not
6 financially feasible to get your
7 residential return on and of in over the
8 20-year period. I concluded that you
9 could get your return on and of on the
10 retail component through its maximum
11 development.

12 Q. Let's stop there. So you would
13 agree that over a 20-year term, which you
14 did not consider in the first instance but
15 Sharon did, you would agree that the
16 highest and best use is a purely
17 commercial use; correct?

18 A. A retail development of the site
19 to its maximum, yes.

20 Q. Okay, but initially your concern
21 was that she did not consider the highest
22 and best use as you determined it in April
23 which was both residential and commercial;
24 right?

25 A. No, she just did not consider --

1 TENER

2 we don't have to agree on the highest and
3 best use. Without consideration of the
4 lease term, it's mixed use residential and
5 commercial. With consideration of the
6 lease term, it's commercial. In neither
7 case did she consider the highest and best
8 use. Plain and simple.

9 Q. Okay. Now did you believe the
10 purpose of your land residual analysis was
11 to develop an independent opinion of value
12 or were you trying to support the fair
13 market rental valuation included in your
14 April 15, 2019 report?

15 MR. KOH: Objection. Go ahead.

16 THE WITNESS: A hundred percent
17 fair market. I'm not trying to
18 suggest anything else.

19 BY MR. WALSH:

20 Q. They just came to the same
21 number?

22 A. No. What happened is, as I
23 expressed in my report, that under the
24 market rent that I was able to research
25 for retail in that area, that there was a

1 TENER

2 range that it could achieve economically
3 and using the residual proved a value that
4 bracketed the original conclusion based on
5 a ground rent determination and I felt for
6 simplicity's sake that it was fair as this
7 was within the range. I could have
8 concluded to the higher end of the range
9 if that was supported. A residual should
10 prove the highest that you could pay but I
11 chose -- I said that it would be
12 reasonable to conclude within that range
13 for which the original value -- the
14 original conclusion fell and as such, I
15 did not change the conclusion I reached.

16 Q. Okay. But before Morris and Sam
17 instructed you to go forward with the land
18 residual analysis, you had already told
19 them that you believed it would arrive at
20 the same value; isn't that right?

21 MR. KOH: Objection.

22 THE WITNESS: No. I said that I
23 believed it would be similar to that
24 because I ran some preliminary numbers
25 based on my knowledge of the area that

1 TENER

2 I still needed to obviously research,
3 but if it had come in lower, I would
4 have concluded lower.

5 BY MR. WALSH:

6 Q. And how long did it -- you did
7 this preliminary calculations at the June
8 19, 2019 meeting in a breakout room on a
9 calculator?

10 A. I did some of them but that was
11 the -- I didn't have my cost data. I just
12 guessed at the cost data. I didn't have
13 retail rent comps so I guessed at that.
14 There was a lot of guessing so it wasn't
15 the number that was presented in my
16 report, it was just some rough
17 guesstimates.

18 MR. WALSH: Okay. So now would
19 actually be a good time to stop. I'm
20 at a good breaking point. Maybe we
21 just take a five, 10-minute break.

22 MR. KOH: Okay with me.

23 THE VIDEOGRAPHER: Thank you, the
24 time is 3:41. We're going off the
25 record.

1 TENER

2 (Recess taken from 3:41 p.m. to
3 3:52 p.m.)

4 THE VIDEOGRAPHER: The time is
5 3:52. We're back on the record. This
6 is the beginning of media 5.

7 BY MR. WALSH:

8 Q. Mr. Tener, what is a land
9 residual analysis?

10 A. A land residual analysis looks at
11 what a property can be constructed to,
12 looks at the finished product, analyzes
13 the property based on its completed and
14 occupied economics so the value upon
15 stabilization. It then solves for the
16 cost to construct the property and reduces
17 that prospective value by the costs of
18 hard and soft to render an indication of
19 the land value.

20 In this case, because we're
21 solving for a rental value, you're looking
22 at the market rents of the improved
23 property based on its highest and best use
24 and then you are deducting the amortized
25 costs of the construction over the lease

1 TENER

2 term to solve for the economic rent that
3 can be paid.

4 Q. Okay. So one of the first things
5 you said was that you analyze what a
6 property can be constructed to and look at
7 the finished product so let's start there.

8 So would you normally figure out
9 what the building -- what the property
10 looks like after construction is
11 completed, is that what I understand you
12 to be saying there?

13 A. To some degree, you can do it
14 through a high level of degree on complex
15 properties designing them, with architects
16 and figuring out every detail of it or you
17 could do it in a generalized sense based
18 on the most likely development of the site
19 based on someone who had more general
20 considerations.

21 Q. So first you have to figure out
22 what can be -- how the property can be
23 developed and then what that development
24 looks like and then would the next step be
25 once you know what that development looks

1 TENER

2 like and what's been constructed on there,
3 what price you can rent out that property
4 as improved out for?

5 A. Yes.

6 Q. Okay. And I think another thing
7 that you said is that a land residual
8 value renders an indication of the land
9 value; is that right?

10 A. Well, it can be used to develop
11 an opinion of the land value or of the
12 rent for the land.

13 Q. But wouldn't you agree that you
14 wouldn't normally develop a land residual
15 analysis in an appraisal to determine the
16 market value of a development site?

17 A. Can you repeat that question?

18 Q. Wouldn't you agree that you would
19 not normally develop a land residual
20 analysis in an appraisal to determine the
21 market value of a development site?

22 MR. KOH: Objection.

23 THE WITNESS: I wouldn't agree.

24 MR. WALSH: Okay. Can we please
25 mark VA 017997?

1 TENER

2 (Exhibit P78, document Bates
3 labeled VA 017997, marked for
4 identification.)

5 VERITEXT CONCIERGE: This will be
6 introduced as Exhibit P78.

7 BY MR. WALSH:

8 Q. This is an e-mail that spans
9 Bates stamp VA 017997 to 018000. The top
10 e-mail is an e-mail from Tom Tener to Sam
11 Rottenberg, Shaun Kest and Theresa Nygard
12 dated June 13, 2018.

13 Mr. Tener, do you have it up?

14 A. I do.

15 Q. So it looks like what happened
16 was that Vanderbilt sent you a copy of a
17 report that TerraCRG had prepared for the
18 property earlier in 2018 and you wrote,
19 "The TerraCRG report investigates several
20 land residual analyses to develop
21 indications of value in addition to their
22 analysis of land sales." And you wrote,
23 "Typically, we would not develop a land
24 residual analysis in an appraisal of the
25 market value of a development site as this

1 TENER

2 provides an indication of the most that an
3 investor can pay for the land, not
4 necessarily what the market value is."

5 So a moment ago I said wouldn't
6 you agree that you wouldn't normally
7 develop a land residual analysis in an
8 appraisal to determine the market value of
9 a development site and you did not agree.
10 Isn't that exactly what you're saying in
11 this e-mail?

12 A. You know, out of context it's
13 similar to what I'm saying, not exactly.
14 The -- if I recall the TerraCRG report,
15 they put in a bunch of assumptions of what
16 they were speccing out as potential
17 development. The reality is that the land
18 residual is a less reliable indicator of
19 land value than the sales comparison
20 approach. However, when you are
21 instructed as this lease document
22 instructs us to use a land residual when
23 you don't have -- sorry, if adequate
24 comparable leases aren't available, then
25 you're being directed. Most of the time

1 TENER

2 that I use land residuals, they are
3 involved in ground rent determinations. I
4 have used them for developers that are not
5 for ground rent determinations but because
6 you are generally the way they are -- the
7 way they are most often used are
8 developers are testing reasonableness of
9 what they can pay for land based on what
10 they think they can build and the returns
11 they can get. So long answer short, the
12 residual is not the best method for
13 determining fair market value of the land
14 but when you are directed to use it, you
15 should use it.

16 Q. Okay. And to be clear, the
17 option rent addendum only says that it can
18 be used if comparable ground leases are
19 not available; right?

20 A. If adequate ground leases are not
21 available.

22 Q. Okay. A land residual technique
23 also requires a highest and best use
24 analysis; right?

25 A. Not necessarily. I've been in

1 TENER

2 one -- I've been involved where the use is
3 defined in ground leases that says -- one
4 we're in right now says the property has
5 to be a rental property even though the
6 highest and best might be a condominium.
7 It's not necessarily just the highest and
8 best use. This one particularly tells you
9 to consider all uses that it can -- the
10 property can be put so that would be the
11 highest and best use.

12 Q. When you say that would be the
13 highest and best use, what do you mean?

14 A. That direction considering all
15 uses the property can be put would be a
16 direction to consider the highest and best
17 use of the property.

18 Q. Okay. And land residual models
19 are often used to test whether something
20 is, in fact, the highest and best use or
21 not; isn't that right?

22 A. Yes, sir.

23 Q. And the highest and best use
24 analysis as we talked about earlier
25 requires that the use be financially

1 TENER

2 feasible; right?

3 A. Yes, sir.

4 Q. Okay. So when you're performing
5 a land residual analysis, you need to know
6 the building value; right?

7 A. Well, in this case you need to
8 know the economic rents of the building.

9 Q. But in order to figure out the
10 economic rents, wouldn't you need to know
11 what kind of building it is?

12 A. Yes.

13 Q. So, for example, if I put up a
14 circus tent on 840 Atlantic Avenue and
15 tried to rent out space, I wouldn't be
16 able to get the same rent that I would be
17 able to get if I put up a class A
18 building; right?

19 A. Yes.

20 Q. Okay. So you need to know what's
21 going to be built and the value of that
22 building first; right?

23 A. Again, in this case you need to
24 know the rental value of that building,
25 not particularly the value, the

1 TENER

2 capitalized value of that.

3 Q. Okay. But to be perfectly clear,
4 the rental value of the building will
5 depend on the quality of the building;
6 right?

7 A. Location, quality, design.

8 Q. Amenities?

9 A. For a retail, no, not amenities.

10 Q. And then you need to be able to
11 estimate the net operating income for the
12 property; right?

13 A. Yes, sir.

14 Q. And then you need to be able to
15 extract, you know, building and land
16 capitalization rates somehow; right?

17 A. No, sir.

18 Q. You disagree with that?

19 A. Not when you are starting with
20 the rental value and solving for the
21 rental value. You do not need to have
22 capitalization rates for that.

23 Q. Okay. So let's talk about that
24 for a second. You said you're starting
25 with the rental value. How can you start

1 TENER

2 with the rental value if you don't know
3 what the building is going to look like
4 and sort of, you know, and the quality of
5 that building, how can you figure that out
6 before you figure out what the end product
7 is going to look like and what people are
8 going to be willing to rent it for?

9 A. I do know what the proposed
10 building would be. I specify it within my
11 cost analysis that it would be a D class
12 taxpayer with below grade parking. I used
13 generalized cost based on Marshall
14 Valuation and utilize that as the
15 amortized cost over the lease term.
16 Specific drawings, renderings are not
17 necessary to perform this form of land
18 residual.

19 Q. And you alluded to this before
20 but would you agree that a land residual
21 analysis isn't necessarily the most
22 accurate way to determine the market rent
23 of a property?

24 A. No, I don't think it's the most
25 accurate but it certainly is the method

1 TENER

2 that is directed when you don't have
3 adequate ground lease comparables.

4 Q. And one of the reasons that it's
5 hard to get an accurate value is because
6 there's a lot of variables, right, in a
7 land residual analysis?

8 A. There can be a lot of variables.
9 Mine is not. Mine is rather simple in
10 terms of the variables that are there.

11 Q. Okay. But in a normal land
12 residual analysis, small variations in
13 those variables could end up dramatically
14 changing the results of a land residual
15 analysis; right?

16 MR. KOH: Objection.

17 THE WITNESS: I disagree with the
18 modifiers you used.

19 BY MR. WALSH:

20 Q. What do you disagree with?

21 A. Small and dramatic I believe.

22 MR. WALSH: If we could pull up
23 what's been marked as ARE 3. If we
24 could mark that, please.

25 (Exhibit P79, document entitled

1 TENER

2 The Appraisal of Real Estate, marked
3 for identification.)

4 VERITEXT CONCIERGE: This will be
5 introduced as Exhibit P79.

6 BY MR. WALSH:

7 Q. So P79 is another excerpt from
8 the Appraisal Institute's 14th edition of
9 The Appraisal of Real Estate. It's pages
10 370 and 371. You can tell me when you
11 have that up and I can direct you.

12 A. I'm on page 370.

13 Q. So if you look under the bullets,
14 1, 2, 3, it says, "The land residual
15 method requires the following conditions
16 be met: 1. Building value is known or
17 could be accurately estimated. 2. Net
18 operating income to the property is known
19 or can be estimated. 3. Both building
20 and land capitalization rates can be
21 extracted from the market." It goes on to
22 say, "Small variations in any of these
23 variables can result in a dramatic change
24 in the land value estimate. For this
25 reason, courts have shown a clear disdain

1 TENER

2 for the land residual method."

3 Do you disagree with The
4 Appraisal Institute there?

5 A. In the generalization, I have
6 some concerns as it relates to the
7 direction within this lease. I don't have
8 a problem in theory but we are -- the
9 residual that I performed and is described
10 within the option agreement does not
11 require us to value the building and solve
12 for the land and building capitalization
13 rates extracted from the market. Those
14 are the biggest variables that will create
15 dramatic changes. We are just solving for
16 an economic fair market rent as defined
17 within the option agreement. What that
18 building would sell for is irrelevant to
19 this appraisal problem. We are solving
20 rents-- excuse me. We are solving rents.
21 I start with rent, I amortize the cost of
22 the building and solve for the final land
23 rent based on what a typical 21,500 square
24 foot single story taxpayer would
25 reasonably achieve in this location, and

1 TENER

2 what it would cost to build anticipating
3 that you would want to recoup your
4 investment on and of that construction
5 over the 20-year period. If the
6 appraisers have an issue with my approach
7 to this, that would be solved in the
8 appraisal proceeding between the three
9 appraisers. That's a reasonable thing to
10 challenge and to talk about. I feel like
11 I have done it as directed within the
12 lease and the complexity of what is in
13 this chapter of The Appraisal of Real
14 Estate goes beyond the particular
15 application in this case.

16 Q. Why is that?

17 A. This is speaking to solving for
18 land value, in other words buy and sell
19 land value. It is solving for what
20 someone would pay for that building in the
21 future, not what someone would pay a rent
22 for it as of a specific date that we are
23 talking about. This is about a
24 speculative improvement on land, the other
25 is about solving for a fair market rent.

1 TENER

2 You are adding significantly more complex
3 elements that are not necessary to
4 understand this appraisal problem. This
5 is geared towards let's understand what
6 this generic site could be built to and
7 sold for in the future and based on these
8 complex leasing and operating issues, what
9 would that building sell for in the future
10 and how long it would take to build it and
11 what would be the construction period, the
12 time frame and solving back what would be
13 the appropriate return on the land over
14 that. That's not pertinent to this
15 appraisal problem. We are just solving
16 for rent.

17 Q. Well, doesn't the land sales
18 comparison approach also value land?

19 A. It does as a component of the
20 fair market rental valuation. The other
21 component is the rent multiplier.

22 Q. And so in both scenarios, you
23 would need to -- strike that.

24 Do you consider yourself an
25 expert in land residual calculations?

1 TENER

2 A. I have testified as an expert in
3 land residual calculations and I have
4 prepared numerous reports of land
5 residuals so I am -- I consider myself
6 one, yes.

7 Q. Do other members of your firm
8 typically ask you to assist with projects
9 that require a land residual technique?

10 A. Yes, sir.

11 Q. So you're sort of the go-to guy
12 at KTR for land residual techniques; is
13 that right?

14 A. I don't know if that's true. My
15 brother, Terry, certainly would be more
16 than capable and there are other people
17 that are trained that would be capable of
18 it but I have a very strong understanding
19 of the technique.

20 MR. WALSH: If we can mark
21 VA 001083.

22 (Exhibit P80, document Bates
23 labeled VA 001083, marked for
24 identification.)

25 VERITEXT CONCIERGE: This will be

1 TENER

2 introduced as Exhibit P80.

3 BY MR. WALSH:

4 Q. If you could open up P80, it's a
5 July 9, 2019 e-mail from you to Sam
6 Rottenberg and Morris Missry.

7 A. It's open.

8 Q. So this is July 9. It's after
9 the June 19, 2019 meeting and you write to
10 tell Sam that you have done some
11 preliminary analysis but have not begun
12 the land residual analysis; is that right?

13 A. Yes, sir.

14 Q. Okay. And you tell him at the
15 bottom of the first paragraph, comparable
16 leases in the 90 to \$100 per square foot
17 range, about 75 triple net, would support
18 our concluded FMR for a 20-year term.

19 Do you see that?

20 A. I do, sir.

21 Q. So what you were telling him here
22 is that if he could find rents in that
23 range, that those rents would support your
24 concluded fair market value; right?

25 A. Out of context, it was -- these

TENER

are the numbers that I -- based on my knowledge and the other appraisals that we had that I was aware of in this area that we have worked on, that I expected this range and that based on my preliminary numbers, I thought that numbers in this range would be -- would support the same range that we concluded, that based on what's out there in the market, that I think a land residual would be consistent with our 20-year conclusion that was already reflected in the report.

Q. Without the encumbrance to the lease; right?

A. No, this might be --

Q. I'm saying you said that your previously concluded value did not consider the encumbrance of the lease, that's all I'm asking if you can confirm.

A. Yes.

Q. Okay. So continuing on you wrote, "The most significant challenge to developing the M1-1 portion of this site to this bulk would be meeting the parking

1 TENER

2 requirements of 1 space for 300 square
3 feet. At 2.4 FAR on the M1-1 portion of
4 this site, we would need 176 parking
5 spaces for the most likely community
6 facility use with retail at grade. We
7 would need an architect to determine if we
8 could construct the below grade parking
9 garage to accommodate this parking
10 requirement and a cost estimator for the
11 hard and soft cost budget. It would
12 likely be a hard sell to get a third to
13 agree that the cost of project of this
14 size could be recovered in a 20 year
15 period."

16 Do you see that?

17 A. I do, sir.

18 Q. So you told him before you did
19 this analysis that it would likely be a
20 hard sell to get a third appraiser to
21 agree that the cost of a project of this
22 size could be recovered in a 20-year
23 period; isn't that right?

24 A. That the project of developing a
25 community facility development use, not

1 TENER

2 the retail that I -- the community
3 facility use required significantly more
4 for parking than retail and that that
5 would not be a feasible residual,
6 community facility, sir.

7 Q. How does the parking differ
8 between --

9 A. It would be significantly higher.

10 Q. So what are the numbers? How
11 many parking spaces do you need per square
12 foot, per --

13 A. I don't have that in front of me
14 but I investigated when I did it.

15 Q. Okay. And you also told them
16 that you would need an architect to
17 determine if you could construct the below
18 grade parking garage; right?

19 A. To facilitate 176 parking spaces.
20 That's a massive development.

21 Q. Did you retain an architect to
22 determine what could be built on the site?

23 A. Yes.

24 Q. Did Morris Missry?

25 A. No, not that I know of, not that

1 TENER

2 I used.

3 Q. Did Vanderbilt?

4 A. Not that I know of.

5 Q. Did you ever retain a cost
6 estimator for the hard and soft cost
7 budget?

8 A. No, I used Marshall.

9 Q. Did Vanderbilt?

10 A. No, sir.

11 Q. Did Morris Missry?

12 A. Not that I know of, sir.

13 Q. And why not?

14 A. Because I didn't need one to
15 design and price out the simple taxpayer
16 that was utilized to determine the fair
17 market rent. It didn't require that level
18 of assistance. We're talking about
19 completely different design in this
20 e-mail. They are not apples and oranges,
21 they are apples and pineapples.

22 Q. Walk me through what you're
23 talking about in the e-mail that we just
24 read versus the building that you
25 ultimately priced out in your land

1 TENER

2 residual analysis.

3 A. So I'm talking about designing a
4 multi-story mixed use community facility
5 and retail development with 176 parking
6 garage space on a site that I don't know
7 if you could accommodate that. That would
8 require an expert to test and design.
9 What I priced -- what I utilized for a
10 land residual is a 12,000 -- I'm sorry, a
11 21,500 square foot grade level taxpayer
12 with a below grade parking garage accessed
13 from a two points on Pacific and
14 Vanderbilt that allowed access for surface
15 and ground below grade parking that is
16 significantly easier to build and not
17 difficult to envision for designer cost.

18 Q. Did you sketch out these plans?

19 A. I don't need to sketch them out.
20 I'm pricing a generic taxpayer. You see
21 them on the one-story taxpayers throughout
22 New York City, you see them in suburbia.
23 They are not difficult to price out or to
24 envision.

25 MR. WALSH: If we could pull up

1 TENER

2 P62, please.

3 VERITEXT CONCIERGE: P62 has been
4 copied over.

5 BY MR. WALSH:

6 Q. This is an e-mail exchange in
7 late July between you and Vanderbilt. Do
8 you have it up?

9 A. I do, sir.

10 Q. On the bottom e-mail on the first
11 page, it's an e-mail, July 23, 2019. It's
12 from you to Sam Rottenberg and Morris
13 Missry. You said, "I have built the model
14 for a land residual and my staff is
15 researching rent comps in the area. I
16 think that both you and Morris mentioned
17 at the McDonald's meeting that you have
18 knowledge of retail lease comps in the
19 \$100 per square foot range in this area.
20 If you could send this information to me
21 for incorporation into our report, it
22 would be helpful as a supplement to our
23 research."

24 What McDonald's meeting were you
25 referring to?

1 TENER

2 A. That was the July 19th.

3 Q. The June 19, 2019 meeting?

4 A. Yeah, June 19, 2019.

5 Q. Okay.

6 A. The one at Wachtel Missry.

7 MR. WALSH: If we could mark
8 VA 001061.

9 (Exhibit P81, document Bates
10 labeled VA 001061, marked for
11 identification.)

12 VERITEXT CONCIERGE: Can you
13 repeat that number, please?

14 MR. WALSH: VA 001061.

15 VERITEXT CONCIERGE: This will be
16 introduced as Exhibit P81.

17 BY MR. WALSH:

18 Q. All right, this is a July 24
19 e-mail exchange between you --

20 A. I don't have it yet.

21 Q. Okay. It's between you and
22 Morris Missry and Sam Rottenberg.

23 A. I got it.

24 Q. Okay. So you were -- you reached
25 out to Sam and Morris on July 24th I guess

1 TENER

2 to find out the status of an agreement
3 with McDonald's. Do you know what that
4 was about?

5 A. I think it's the agreement of how
6 the reports would be exchanged between
7 Sharon and myself, the revised reports.

8 Q. And Morris responded no, need you
9 to do your thing.

10 What did you understand that to
11 mean, need you to do your thing?

12 A. I have no idea.

13 MR. WALSH: Okay, if we could
14 pull up VA 001039.

15 (Exhibit P82, document Bates
16 labeled VA 001039, marked for
17 identification.)

18 BY MR. WALSH:

19 Q. By the way, did you think that
20 Morris was asking you to prepare a land
21 residual analysis that would justify your
22 original valuation, is that what he meant
23 by do your thing?

24 MR. KOH: Objection.

25 THE WITNESS: I don't think

1 TENER

2 that's remotely what I would think he
3 was saying.

4 BY MR. WALSH:

5 Q. So what do you think --

6 A. I don't recall what he was saying
7 but certainly I have never had that
8 thought that you articulated in your
9 question in my head at all.

10 VERITEXT CONCIERGE: This will be
11 marked as Exhibit P82.

12 THE WITNESS: It's up.

13 BY MR. WALSH:

14 Q. So this is a July 30 e-mail from
15 you to Morris Missry and Sam Rottenberg
16 transmitting your July 30, 2019 report and
17 invoice for June and July hours.

18 You wrote, "Attached is my
19 revised FMV letter incorporating the land
20 residual analysis, which is supportive of
21 my original determination of the FMV."
22 That's what you wrote; right?

23 A. Yes, sir.

24 Q. And if we can pull up -- and just
25 to be clear, was your assignment to

1 TENER

2 prepare an independent valuation using the
3 land residual technique or was it to
4 perform an estimate that would support
5 your original determination of the fair
6 market value?

7 A. The first.

8 Q. So this was an independent
9 valuation?

10 A. Yes, sir.

11 Q. Okay. Because those are two
12 different things; right? An independent
13 valuation versus trying to match a
14 previous valuation, those are very
15 different things, you would agree; right?

16 A. I would never take an assignment
17 to try to match something else. That's
18 not how I appraise.

19 Q. Okay. So it's your testimony
20 that you would have done the land residual
21 technique in the first instance exactly
22 the same way if you had not already issued
23 your April 15, 2019 report?

24 A. I would have done it very similar
25 but the results would be the same.

1 TENER

2 MR. WALSH: All right, if we
3 could pull up P36, please. This is
4 the July 30, 2019 report and
5 Mr. Tener, you'll also have a hard
6 copy of this. It starts with
7 VA 001045.

8 VERITEXT CONCIERGE: P36 has been
9 copied over.

10 THE WITNESS: I have to find
11 which binder it's in.

12 Almost there. I have it.

13 BY MR. WALSH:

14 Q. Okay. So this is your revised
15 July 30, 2019 report; right?

16 A. Yes, sir.

17 Q. And this is identical to your
18 original April 15 report except that you
19 added an additional section on page 4
20 entitled Land Residual; right?

21 A. I would have to do a compare
22 document but it's very similar.

23 Q. And your conclusion -- and even
24 though you performed a land residual
25 analysis to account for the 20-year term

1 TENER

2 of the McDonald's lease, your conclusion
3 on the fair market rental value of the
4 property stayed exactly the same; right?

5 A. My conclusion on the residual is
6 that the value is between 1,310,600 and
7 1,478,300 per year and I concluded that it
8 was directly supportive of the value
9 derived in the standard market data
10 approach of 1,348,000 and chose not to
11 revise that.

12 Q. So your concluded fair market
13 rental value was exactly the same in this
14 report as it was in your previous report;
15 right?

16 A. Yes.

17 Q. Is it your professional opinion
18 that a sophisticated and knowledgeable
19 investor would pay exactly the same amount
20 for a piece of land that they can develop
21 and own in perpetuity, that they would pay
22 for a parcel that they could only benefit
23 for a defined 20-year period of time?

24 A. Can you repeat the question,
25 please?

1 TENER

2 Q. Is it your professional opinion
3 that a sophisticated and knowledgeable
4 investor would pay exactly the same amount
5 for a piece of land that they can develop
6 and own in perpetuity than they would for
7 a parcel that they can only use and
8 benefit from for a defined 20-year period
9 of time?

10 MR. KOH: Objection. Go ahead.

11 THE WITNESS: So the two would be
12 different. One would be a purchase
13 and one would be a rental so they
14 would not be the same.

15 BY MR. WALSH:

16 Q. Right. So what someone would pay
17 to own a property outright would be
18 different than what they would pay to
19 basically own it for a 20-year period of
20 time; right?

21 A. It would be a capitalization of
22 that rent in perpetuity as opposed to over
23 a shorter period of time.

24 Q. And what an investor could do
25 with a property for a 99-year ground lease

1 TENER

2 is very different than what an investor
3 could do for a 20-year ground lease;
4 right?

5 A. In this case, I concluded that
6 you could only build a 21,500 square foot
7 taxpayer for the 20-year period and for
8 the longer period, that you would be able
9 to build a mixed use residential and
10 retail so it would be different.

11 Q. But you came up with the
12 identical value even though one analysis
13 considered the encumbrance of the 20-year
14 term and the other did not. So I'm just
15 trying to understand how is that possible?

16 A. Well, when you read the report,
17 you see that the economics of building a
18 taxpayer allows for someone to pay via
19 land residual and up to \$1,478,000 per
20 year and still make -- amortize their
21 costs and not pay above market rent for
22 the building they can construct. They are
23 not committing to paying that for a
24 hundred years. They are only paying that
25 for control over a 20-year period. Based

1 TENER

2 on the economics of that less expensive
3 investment, they are able to pay a rent
4 that is even higher based on my residual
5 than the long-term commitment of 49 or 99
6 years. In that 49- or 99-year lease you
7 would have additional resets in the
8 future, you would have other obligations
9 including longer development periods, a
10 more complex asset. Based on the two
11 analyses, I did not go into it thinking
12 that they would be the same but it proved
13 the residual that on a short period of
14 time, 20 years, you could potentially pay
15 even more than my conclusion via the land
16 valuation and fair market determination
17 via the market -- standard market data
18 approach.

19 Q. So you were surprised that the
20 numbers worked out exactly the same?

21 A. Not -- they didn't work out
22 exactly the same. There was a range. The
23 range showed -- and remember a residual
24 shows what you can pay based on these
25 analyses, depending on what developer and

TENER

residual technique would model, whether it's 90 or a hundred dollars a foot, you could pay as much as 1.3 million to almost 1.5 million under the land residual. You might even be able to pay more because my land residual didn't even include the potential benefits of ICAP, that you would get 15 years of tax savings or significant tax abatement for the improvement. I processed full taxes in my analysis which really understates the return that the tenant would achieve.

Q. On page 2 of your report, even though you're now in this report taking into account the 20-year term of the McDonald's lease, you kept your conclusion on page 2 that "Based on the subject's current zoning and considering the uses exhibited by recent development in the immediate area, the highest and best use of the subject, as if vacant, would be commercial development of the portion of the site zoned M1-1 and residential development in the R6B zone portion of the

1 TENER

2 site."

3 Is that still accurate with the
4 20-year term of the lease?

5 A. No, it's residential -- retail
6 only. Residential I concluded would not
7 be feasible.

8 Q. So why did you keep that highest
9 and best use analysis or conclusion if
10 it's not accurate anymore?

11 A. It probably could have been
12 clarified better in the letter. I think
13 when I was writing it I was not
14 considering the term when I left that text
15 in there. I probably should have added a
16 phrase that for the 20-year period that
17 the residential would not have -- would
18 not be economically feasible and only
19 retail would be. It's probably a slight
20 of communication on my part.

21 Q. Okay, but you skill kept in this
22 entire first analysis of the land sales
23 comparison approach, right, but this -- is
24 this valuation still valid considering
25 that you've now arrived at a different

1 TENER

2 highest and best use for 20 years?

3 A. What we are saying is that --
4 what I am saying is that the land
5 valuation does not change, that that's
6 what land is worth in that area. What
7 does change potentially is the rent
8 multiplier. I may have been shy on my
9 rent multiplier in the initial 8 percent.
10 It could have been higher than that, there
11 was potential for higher. But the land
12 residual proves that it's generally
13 consistent with the conclusion that was
14 originally received. As I stated earlier,
15 I easily could have concluded to a higher
16 number at a million 478. That is
17 supported by the land residual as well.

18 Q. So where in your work file do you
19 prove that the land value is the same
20 regardless of the highest and best use
21 conclusion, using a land sales comparison
22 approach?

23 MR. KOH: Objection. Go ahead.

24 THE WITNESS: The highest and
25 best use of that land is still the

1 TENER

2 same. The highest and best use
3 feasibly of what you can build in a
4 20-year period is different but the
5 highest and best use of the land
6 remains mixed use residential and
7 retail. Under the 20-year period, I
8 conclude that you could not get your
9 residential back so I don't conclude
10 that it's the same. I conclude that
11 under the 20 years, it would be --
12 would be retail only.

13 BY MR. WALSH:

14 Q. Here's what I'm trying to
15 understand. You are now considering the
16 encumbrance of the lease and you have an
17 entire section of your report that talks
18 about residential development sites and
19 how the highest and best use is both
20 commercial and residential, and what I'm
21 hearing you say now is that residential
22 isn't possible even though you say on page
23 2 that is the highest and best use and you
24 arrive at this land valuation with
25 assumptions about what residential could

1 TENER

2 be built and what you're telling me is
3 that residential can't be built. So I'm
4 wondering why is all of this still in the
5 report if it's not relevant and accurate?

6 A. It is still relevant outside the
7 term of the lease and it's a valid
8 critique that the appraisal proceeding
9 would address if -- but it certainly
10 addresses the highest and best use of the
11 property exclusive of the 20-year term.
12 So it is a valid critique that I would
13 have to sit down and think about and
14 explain why it's -- it hasn't been
15 changed. At the end of the day, the land
16 residual is driving the value and
17 potentially could have been slightly
18 different but not lower than the one
19 million 310 and as high as one million
20 478.

21 Q. And do you really not believe
22 that your land residual analysis and the
23 value you reached there was somehow driven
24 by a desire to match the value you arrived
25 at in April 2019?

1 TENER

2 MR. KOH: Objection. Go ahead.

3 THE WITNESS: It was definitely
4 not true. It was driven by market
5 information. Just because there's
6 communication that says that I believe
7 that the market will support a number
8 like that does not correlate to a
9 goal.

10 MR. WALSH: If we could pull --
11 mark VA 00959, it's an Excel
12 spreadsheet called (Quick
13 Residual).xlsx.

14 VERITEXT CONCIERGE: This will be
15 marked as P83.

16 (Exhibit P83, document Bates
17 labeled VA 000959, marked for
18 identification.)

19 BY MR. WALSH:

20 Q. So this is your land residual
21 model for this property; right?

22 A. This is my basic one. The costs
23 are on sheet 2. The pro forma is on sheet
24 1.

25 Q. Why is this called quick

1 TENER

2 residual?

3 A. Because it was the same file that
4 I used when I first made this. I just
5 never renamed it.

6 Q. Is this the same model that you
7 typically use when you are preparing a
8 land residual analysis?

9 A. No, normally I'm not solving for
10 rent -- rental value, I'm solving for land
11 value on a residual. This is a different
12 model to address this particular appraisal
13 problem.

14 Q. Have you ever used this model
15 before?

16 A. This particular one, no, but I've
17 used similar models to test highest and
18 best use on a residual basis.

19 Q. And given that you had arrived at
20 the land value using the land sales
21 comparison approach and then used the cap
22 rate to arrive at a ground rent in your
23 original analysis, how come you couldn't
24 use your normal land residual model,
25 arrive at a land value rate and then apply

1 TENER

2 cap rate to that?

3 MR. KOH: Objection.

4 THE WITNESS: One, I didn't apply

5 a cap rate. It was a rent multiplier.

6 Two, there's no reason to complicate

7 the process by adding sales, and this

8 is a 20-year hold so we're solving for

9 a rent during the 20-year period.

10 There is no sale. It's not necessary

11 and not appropriate to it.

12 BY MR. WALSH:

13 Q. So let's start with sheet 1. You

14 assumed a 21,500 square foot retail

15 building could be built at this site and

16 rented out between 90 and \$100 per square

17 foot; right?

18 A. Yes.

19 Q. I think you used the phrase on a

20 modified gross basis. What does that

21 mean?

22 A. Real estate taxes over base, the

23 tenant would pay -- the tenant or tenants

24 would reimburse real estate taxes over a

25 base year amount. All other operating

1 TENER

2 expenses are effectively met.

3 Q. And what data did you use to
4 estimate real estate taxes in the range of
5 \$20 per square foot?

6 A. 20 percent of EGI is what I used
7 as the estimate of real estate taxes and
8 that's roughly based on the New York City
9 assessors guidelines published each year.
10 There's a range of taxes as a percentage
11 of EGI that the assessor targets and
12 that's what I used.

13 Q. How did you determine that the
14 site could support a 21,500 square foot
15 retail building?

16 A. Based on the floor print of the
17 site that is zoned retail, looked at the
18 site, physically looked at the structures
19 around it, drew a map and basically
20 assumed that the commercial or M1 portion
21 of the site could be built full.

22 Q. So how much square footage of
23 M1-1 is on this site?

24 A. I believe it's 21,500 square
25 feet.

1 TENER

2 Q. So you estimated that every
3 single square foot of property that was
4 zoned as M1-1 could have a part of the
5 building on it?

6 A. Yes, sir.

7 Q. Okay. And you drew it out on
8 like a -- you mocked it up on like a pad
9 or what did you -- how did you determine
10 that?

11 A. I said I assumed that it could be
12 built full. I did not draw it out. It
13 would have been the site, the portion of
14 the site that is zoned M1-1 is assumed to
15 be built full.

16 Q. Now, this is a U-shaped parcel;
17 right?

18 A. Yes, sir.

19 Q. So what parts of the property are
20 zoned as M1-1?

21 A. I'll pull up my report to look at
22 the blueprint. If I recall correctly, the
23 portions of the site that are front on
24 Vanderbilt and Atlantic, and I believe the
25 portion that is residential fronts on

1 TENER

2 Pacific, east of the -- sorry, excuse me,
3 the residential building on Pacific, I
4 believe there's also a small sliver that
5 is under M1-1.

6 Q. Under your hypothetical
7 development, what would happen to the R6B
8 portion, would it just be empty?

9 A. It would be parking and access to
10 the underground parking.

11 Q. So you would be allowed to put a
12 parking lot on the R6B portion?

13 A. That's my understanding. There
14 already is one there, sir.

15 Q. Okay. Well, that's an existing
16 use, right, so are you certain that
17 currently you can put a parking lot on
18 that R6B portion?

19 A. An existing use would be
20 permitted to be retained, so yes, sir.

21 Q. Even with a new tenant?

22 A. Even with the new development, an
23 existing use on that would be permitted to
24 be retained.

25 Q. How much parking would you need

1 TENER

2 for a 21,500 square foot retail building?

3 A. Offhand, I know I calculated it.

4 Q. And if you could just tell me
5 what you're looking up I'd appreciate it.

6 A. Right now I'm looking at the
7 marginal costs.

8 Q. We'll get there. We'll get
9 there. We'll talk about parking a little
10 bit. Did you anticipate that this
11 building would have bathrooms in it?

12 A. They would have bathrooms, yes.

13 Q. How many?

14 A. I don't know, sir.

15 Q. Okay. How many separate spaces
16 would this building be broken up into?

17 A. I didn't specify to that level of
18 detail. This is a building that could be
19 single tenant, it could be multi-tenant.
20 Whatever it ends up being demised, my
21 residual is based on an average rent.

22 Q. And your 2.1 million dollar
23 estimate of hard construction costs is
24 contained on sheet 2; right?

25 A. Yes, sir.

1 TENER

2 Q. I'd like to walk through that
3 calculation with you.

4 The \$57 per square foot, that is
5 for what Marshall & Swift refers to as low
6 cost class D construction; right?

7 A. Yes, sir.

8 MR. WALSH: If we could mark the
9 document called Marshall Valuation
10 Service.

11 (Exhibit P84, document entitled
12 Marshall Valuation Service, marked for
13 identification.)

14 VERITEXT CONCIERGE: This will be
15 introduced as Exhibit P84.

16 BY MR. WALSH:

17 Q. And Mr. Tener, these are excerpts
18 from Marshall & Swift.

19 What is Marshall & Swift?

20 A. It's the nationally published
21 cost estimator service that derives its
22 costs from recorded contributors of
23 construction.

24 Q. And a lot of appraisers maintain
25 a comprehensive file of current cost data;

1 TENER

2 right?

3 A. I don't know whether a lot of
4 appraisers do or not.

5 Q. Does your firm do that?

6 A. What did you say?

7 Q. Like maintain a file of current
8 cost data so you understand what
9 construction costs. Do you do that or no?

10 A. We have some construction costs
11 but we don't have a file of construction
12 costs. For construction costs we use
13 Marshall.

14 Q. And you also sometimes use cost
15 estimators; right?

16 A. Yes, sir.

17 Q. Okay. In your experience, which
18 provides a more accurate level of -- which
19 is more accurate, a professional cost
20 estimator or Marshall & Swift?

21 MR. KOH: Objection.

22 THE WITNESS: I would think that
23 a professional cost estimator would
24 provide a greater level of detail.

25 ///

1 TENER

2 BY MR. WALSH:

3 Q. And you had told Vanderbilt a few
4 weeks earlier that you would want to
5 retain a professional cost estimator if
6 you went down the path that Sam had
7 suggested; right?

8 A. If we're designing a multi-level
9 mixed use community facility and retail
10 project, yes, I asked for that level of
11 complexity and I thought it would be
12 appropriate to have one.

13 Q. Did you suggest a professional
14 cost estimator for this project?

15 A. No, sir.

16 Q. Did you suggest that they hire an
17 architect for mixed use?

18 A. No, sir.

19 Q. So if you could turn to page 13
20 of the pdf that's just been marked as
21 Exhibit P84, it's titled Calculator Method
22 Retail Stores.

23 Do you see that?

24 A. I do, sir.

25 Q. Okay. And this lists the

1 TENER

2 different classes of construction for
3 retail stores; right?

4 A. It does.

5 Q. A through D, Dpole and S; right?

6 A. Yes, sir.

7 Q. And you chose low-cost class D;
8 right?

9 A. Yes, sir.

10 Q. And that's where you came up with
11 the \$57 per square foot amount; right?

12 A. Yes, sir.

13 Q. Now it says for exterior walls
14 next to low class cost D, low-cost stucco
15 siding, very plain exterior?

16 A. Yes, sir.

17 Q. And for the interior finish it
18 says drywall, cheap acoustic tile, asphalt
19 tile, few partitions; right?

20 A. Yes, sir.

21 Q. Under lighting, plumbing and
22 mechanical, it says minimum lighting and
23 outlets, minimum plumbing; right?

24 A. Yes, sir.

25 Q. And actually in the average cost

1 TENER

2 D, under lighting, plumbing and
3 mechanical, it lists restrooms. Do you
4 see that?

5 A. Where, sir?

6 Q. Directly above an average cost D
7 lighting, plumbing mechanical. Right
8 above where we were just looking it says
9 adequate store lighting, restrooms and
10 low-cost fixtures. Do you see that?

11 A. Yes, sir.

12 Q. But low-cost D doesn't say
13 anything about restrooms, does it?

14 A. No, it says minimum plumbing,
15 sir.

16 Q. And it also says minimum
17 lighting; right?

18 A. Yes, sir.

19 Q. Whereas the category above says
20 adequate store lighting?

21 A. Yes, sir.

22 Q. So is it -- what low-cost class D
23 buildings are you aware of in Brooklyn
24 that have been built in the past 20 years?

25 A. I don't know, sir. I was pricing

1 TENER

2 out something that would be fully
3 depreciated within the 20-year period.
4 The minimum plumbing would be roughed out
5 for a tenant to install restrooms. This
6 is what I considered someone who would
7 control the property for 20 years would
8 construct and I thought this was the most
9 appropriate costing level and construction
10 level construct for a 20-year period.

11 Q. But if you had upgraded from
12 low-cost class D to average-cost class D
13 in order to get adequate store lighting
14 and restrooms, the price per square foot
15 would have jumped up to \$80 per square
16 foot; right?

17 A. Would you like me to test that
18 and see what that would do?

19 Q. Well, it changes it by at least
20 600,000; is that right?

21 A. I don't know. Would you like me
22 to test that, sir?

23 Q. I would love it.

24 A. At that cost level the hard cost
25 would go to -- sorry. 681,000. At the

TENER

\$90 foot rent the FMR would be 1,255,571. At the hundred dollar FAR rent it would be 1,423,000, still bracketing my conclusion and not materially change the residual.

Q. Is there a demand for low-cost class D construction for retail purpose in this area of Brooklyn?

A. I believe that there would be demand for single-story retail of that design in this location and I have concluded to my opinion of the fair market rent in my report.

Q. So what is your conclusion that there is demand for low-cost class D retail space in Brooklyn based on?

A. I think it's based on the strong retail demand in that area, the exposure of that site, the physical nature of the retail in that location. The box is not the important part, it's the location and the exposure. A McDonald's development is even less of a construction quality. The S type is even a lower cost construction type than the D. It's not always driven

1 TENER

2 by the box, the quality of the box. It's
3 the location and exposure which this
4 property has an exceptional location and
5 exposure.

6 Q. Looking back to sheet 2 of your
7 quick residual analysis, you assumed zero
8 dollars for heating, cooling and
9 ventilation; right?

10 A. Additional, zero additional
11 dollars, yes.

12 Q. And you assumed no elevator;
13 right?

14 A. Yes, sir, no elevator.

15 Q. Wouldn't you need an elevator
16 since you were building an underground
17 parking garage?

18 A. Absolutely not.

19 Q. No? What is that assumption
20 based on?

21 A. It's ramp entrances and it would
22 have staircases.

23 Q. Now, where -- how did you come up
24 with the 1.042 height per story
25 multiplier?

1 TENER

2 A. I believe that's based on the 14
3 foot estimated height of the first story
4 based on D, it would be in the back -- in
5 that section, there would be a --

6 Q. Is that section 13 page 42?

7 A. I don't know but we can look.

8 Yes, it is.

9 Q. And how about the 0.790 floor
10 area perimeter multiplier?

11 A. That would probably be the table
12 directly above that.

13 Q. How did you determine the
14 perimeter of the building, the floor area
15 perimeter.

16 A. Based on the perimeter of the --
17 based on the perimeter of the M1.

18 Q. So you must have sketched it out,
19 figured out dimensions and figured out the
20 perimeter that way?

21 A. I don't know, sir.

22 Q. So how did you arrive at a 9,342
23 square foot parking area?

24 A. I don't recall.

25 Q. Because that's a very specific

1 TENER

2 number.

3 A. It is.

4 MR. KOH: Can you tell me where
5 you're looking for that number?

6 THE WITNESS: It's in sheet 2,
7 column F, row 35.

8 MR. KOH: Thank you, I see it.

9 BY MR. WALSH:

10 Q. How big -- or I guess what is the
11 minimum size parking spot that could have
12 been used here?

13 A. I don't know. I'd have to look
14 at my files to go through on how I
15 calculated that. That potentially could
16 be one. It seems small to me.

17 Q. It seems small to me, too.

18 A. But I have to -- I would have to
19 check.

20 Q. And how did you figure out what
21 this parking area would look like? Did
22 you figure out where the aisles would be,
23 where the ramp would be? How did you
24 figure that out?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: I don't recall. I
3 would like to find my calculations and
4 repeat it but I don't have an answer
5 right now.

6 BY MR. WALSH:

7 Q. If you could turn to page 1 of
8 the Marshall pdf which has been marked as
9 Exhibit P84. Look up at the top where it
10 says, "Class D buildings generally have
11 wood frame, floor, and roof structure.
12 They may have concrete floor on grade and
13 other substitute materials, but are
14 considered combustible construction. This
15 class includes the pre-engineered pole- or
16 post-frame hoop and arch-rib-frame
17 buildings."

18 Is that your understanding of
19 what you were proposing for this site?

20 A. That and the description in the
21 class of construction below.

22 Q. Okay. So wood or steel studs in
23 bearing wall and primarily combustible
24 construction?

25 A. Yes, sir.

1 TENER

2 MR. WALSH: Why don't we take a
3 break.

4 THE VIDEOGRAPHER: Is that okay
5 with everyone?

6 MR. KOH: It's okay with me.
7 When do you want to come back?

8 THE VIDEOGRAPHER: Well, let's go
9 off the record. The time is 5:06.
10 We're going off the record.

11 (Recess taken from 5:06 p.m. to
12 5:16 p.m.)

13 THE VIDEOGRAPHER: The time is
14 approximately 5:16. We're back on the
15 record. It's the beginning of media
16 6.

17 BY MR. WALSH:

18 Q. Mr. Tener, what information would
19 you need to review in order to determine
20 where you came up with the 9,342 square
21 feet of parking?

22 A. I would have to find my -- the
23 parking spaces that I needed and the
24 square footage that I used for the average
25 parking spaces necessary to create -- to

1 TENER

2 come up with that size.

3 Q. And you believe that's somewhere
4 in your work file?

5 A. I hope so. Otherwise I will have
6 to re-hand calculate and make sure that I
7 have it correctly.

8 Q. Okay. So let's go back to the
9 quick residual spreadsheet, sheet 1. So
10 you came up with the hard cost, estimated
11 hard costs of 2.1 million and you
12 estimated 20 percent soft costs. What
13 exactly --

14 A. I'm not there.

15 Q. Oh, I'm sorry. It's P83, the
16 quick residual spreadsheet. So you
17 assumed a 20 percent soft cost figure
18 based off of the 2.1 million of hard
19 costs. What exactly do you believe is
20 captured within that 20 percent soft cost
21 estimate?

22 A. It's the traditional ones that
23 I've always used. It's architectural
24 engineering fees, filing fees, some
25 carrying costs during construction,

1 TENER

2 including real estate taxes during that,
3 some other soft costs associated with
4 marketing and things like that. It's your
5 traditional soft costs associated with
6 construction.

7 Q. That's what I'm trying to nail
8 down. So these are construction soft
9 costs?

10 A. They are development hard and
11 soft costs. They're -- I pretty much
12 answered the question. They are
13 development soft costs.

14 Q. You use the term traditional soft
15 costs. I'm trying to understand
16 everything that's captured within that
17 because I'm not an appraiser, right, I'm
18 not a construction developer.

19 A. We often use a range of hard and
20 soft costs, soft costs as a percentage of
21 hard costs. And generally the low can be
22 as low as 15 percent. For more complex
23 assignments it could be as high as 25
24 percent. If you're including financing
25 within that, it can go higher. This is

1 TENER

2 not including financing costs other than
3 minimal ones that would be associated with
4 the development of this. So it's
5 generally a rule of thumb allocation that
6 I thought was appropriate to this level.

7 Q. How long would it take to get a
8 building like this with the parking garage
9 built and ready for tenants to move in and
10 open up their store?

11 A. Six months to a year.

12 Q. Okay. But your model assumes
13 that the developer could generate income
14 for a full 20-year period; right?

15 A. No, my model amortizes the costs
16 over a 20-year period. It takes the
17 initial rent of a hundred dollars a foot,
18 takes six months free rent off of that,
19 amortizes that over the term. So I don't
20 think that's an accurate statement.

21 Q. Well so, but let's look at this.
22 I understand that you -- I'm not talking
23 about the building cost. I'm talking
24 purely about the amount of rent that you
25 believe can be generated over a period of

1 TENER

2 20 years. I've done the math and maybe
3 just correct me if I'm wrong, the only
4 period of time where I see that you're not
5 accounting for rent is you're assuming
6 that over the course of 20 years, you have
7 to give a six-month rent concession and
8 then you deduct \$43,000 a year for that.
9 But other than that, you're assuming
10 tenancy on day one of year one through the
11 last day of year 20 without any break;
12 isn't that right?

13 A. I am assuming that the tenant who
14 would take this and build this would get
15 six months free rent, that the economics
16 that they would pay based on would be this
17 80 to hundred dollars a foot rent based on
18 its full development of the site.

19 Q. Right. But this isn't a ground
20 lease; right? The developer is building
21 the store, building the building and then
22 renting out the building. So the building
23 can't be rented out until it's complete;
24 right?

25 A. Correct. The tenant is building

1 TENER

2 a store in this scenario. The tenant is
3 the one paying the fair market rent. That
4 is a residual.

5 Q. So you're assuming that someone
6 will buy this property, pay the rent but
7 isn't that -- you're talking about a
8 ground lease rent though; isn't that
9 right? What you're talking about is a
10 ground lease. The residual you built is
11 based upon retail rents.

12 A. The rents for a single-story
13 retail, correct.

14 Q. Right. So whoever is paying this
15 rent isn't assuming they are also going to
16 have to build the building; right? They
17 are moving their business into a space in
18 your building; right?

19 A. No, that's the amortization of
20 the building is being taken off. The 1.7
21 million would be that cost the
22 construction of it is what comes off
23 solves for the rent that would be
24 attributable to the land.

25 Q. Okay, so that's a big difference.

1 TENER

2 So just to be perfectly clear, you are
3 assuming that whoever is paying this
4 hundred dollars per square foot of rent is
5 responsible for also building the building
6 that's going to be put on this site?

7 A. That's the residual analysis is
8 what is the economic rent, what is the
9 cost to construct this and taking that off
10 of the economic rent, that is the
11 residual.

12 Q. So I guess we'll get to it when
13 we look at your rent comps.

14 Don't you -- where do you account
15 for lease up time or is it your view that
16 you don't have to consider either the time
17 for construction or the time to lease the
18 property because the person is also
19 responsible for building the building?

20 A. The property is turned over with
21 20-year term. The economics of the rent
22 for that is adjusted by the cost to build
23 the property.

24 Q. Okay.

25 A. And the concession here

1 TENER

2 obviously.

3 Q. And so there's no lease up time
4 that's considered in this analysis?

5 A. This is leased. Yes, this is
6 leased to -- in this scenario, this is to
7 solve for the rental.

8 Q. When you say this is leased, what
9 is leased, just the property?

10 A. Yes.

11 Q. So here's the disconnect. What
12 you're describing sounds to me like a
13 ground lease, whereas my understanding is
14 that you compared what tenants of retail
15 buildings were paying for those spaces but
16 what you're describing is a ground lease.
17 Am I correct?

18 A. Yes. I'm solving for the ground
19 rent using the economics of retail in this
20 location, less the amortized cost to
21 build.

22 Q. So is that why you also don't
23 have any contingency for vacancy and
24 collection costs?

25 A. Yes, sir.

1 TENER

2 Q. Where is -- what is
3 entrepreneurial incentive?

4 A. Entrepreneurial incentive is the
5 reward for developing something.

6 Q. And the concept is that if
7 someone is going to develop something,
8 they want to make sure that they make
9 money off of it; right?

10 A. Yes.

11 Q. Where does your model contemplate
12 or account for entrepreneurial incentive?

13 A. It doesn't. This is the end user
14 that the tenant in control of this.

15 Q. So how do they make money off of
16 it?

17 A. They are paying economic rent on
18 this. That is the economic rent
19 calculation for controlling the dirt for
20 20 years.

21 Q. Okay. So as I understand it
22 then, they would have to pay the fee owner
23 of the property a hundred dollars a square
24 foot for 20 years. Then they have to
25 build a building on it with a parking

1 TENER

2 garage and then they have to charge rent
3 to other tenants, that's what you're
4 assuming?

5 A. They would pay the opposite of
6 that. They would pay the landlord 1.348
7 million dollars per year. The
8 amortization of the cost of building the
9 improvements would be roughly \$200,000 per
10 year and then you work your way back up to
11 the economic rents to achieve that.

12 Q. Right, but where do they make
13 money?

14 A. This is the economic rent for
15 leasing this dirt.

16 Q. But that's not my question. How
17 does anybody that does what you're
18 proposing make money? Can you
19 demonstrate, how do they make money?

20 A. By operating their business
21 there. This is not -- this is not -- this
22 is not a developer's return. This is a
23 tenant paying for what could be built
24 there, residually.

25 Q. Now why wouldn't they just rent a

1 TENER

2 building that's already built?

3 A. That's not the equation here.

4 Q. Okay. So in your view, someone
5 would build a low-cost class D building
6 rather than renting -- for all -- all of
7 this cost rather than renting a
8 preexisting building somewhere in the same
9 neighborhood?

10 A. I'm not saying rather than. I'm
11 saying this is a residual that proves what
12 you would pay via the residual of what the
13 market rent for that space is, what the
14 amortized cost to build that space would
15 be.

16 Q. But there's got to be some
17 incentive for them to do that; right?
18 What I'm trying to understand is why would
19 they go this route if they could just move
20 into a fully built-out building with
21 bathrooms and pay the same hundred dollars
22 a square foot?

23 A. What is the incentive of
24 McDonald's building their space on a site
25 to run their business there? What is the

1 TENER

2 incentive is to run your business there.

3 Q. And how did you determine
4 financial feasibility in this model?

5 A. That the -- that the concluded
6 rent of \$1,348,000 a year plus the
7 amortized costs associated with
8 constructing that property are less than
9 the market rent that could be achieved for
10 that property.

11 Q. What do you mean the market rent
12 that could be achieved for that property?

13 A. The 1.72 million dollars a year
14 versus the -- sorry, I can't edit this but
15 the roughly high-end 1.72 million dollars
16 a year.

17 Q. Where does that number come from?

18 A. That's \$100 a foot less real
19 estate taxes times 21,500 square foot.

20 Q. Okay. Doesn't your model prove
21 that this actually is not a financially
22 feasible use?

23 A. No, sir.

24 Q. You disagree with that?

25 A. Yes, sir.

1 TENER

2 Q. Okay. Show me where the
3 incentive is, where is the incentive for
4 somebody to take on this risk?

5 A. Again, what is the incentive for
6 a tenant to rent ground and build their
7 building there? It is -- the incentive is
8 to run their business and make a profit.
9 This is a residual to prove the rent.

10 Q. So who is -- what businesses are
11 you aware of that would take on this risk?

12 A. I have not given that a thought.

13 Q. So if you're not aware of any
14 businesses that would take on this risk,
15 how can you be so sure that this is a
16 financially feasible use?

17 A. That's not what my answer was
18 that I'm not aware. I said I have not
19 given that a thought. But to be
20 financially feasible is proven by the fact
21 the ground rent payment plus those
22 amortized costs is less than the rent that
23 could be achieved there so it's
24 financially feasible.

25 MR. WALSH: All right. If we

1 TENER

2 could mark VA 002153.

3 (Exhibit P85, document Bates
4 labeled VA 002153, marked for
5 identification.)

6 VERITEXT CONCIERGE: I don't have
7 a -- never mind.

8 MR. WALSH: It's a spreadsheet
9 named (Retail Rent Comps).xlsx.

10 VERITEXT CONCIERGE: It's in
11 here. This will be marked as Exhibit
12 P85 and introducing now.

13 BY MR. WALSH:

14 Q. If you could please open up P85.

15 A. It's open.

16 Q. This spreadsheet contains the
17 data that you used to justify market rent
18 levels of 90 to \$100 per square foot;
19 right?

20 A. Yes, sir.

21 Q. And the first half of this
22 spreadsheet called Retail Rent Comps
23 contains eight purported rent comps;
24 right?

25 A. Yes, sir.

1 TENER

2 Q. And the rentable square footage
3 of the comps ranges from 900 square feet
4 on the low end to 4,700 square feet on the
5 high end; right?

6 A. Yes, sir.

7 Q. And your spreadsheet notes that
8 the average square footage of the eight
9 spaces is 1,965 square feet; right?

10 A. Yes, sir.

11 Q. So if each tenant in your
12 proposed building took a space -- let me
13 ask it this way: You are comparing a
14 21,500 square foot building to comps that
15 on average are 1,965 square feet; right?

16 A. I am looking at the comparables
17 within that range, from 900 to 4,700
18 square feet, yes.

19 Q. With an average of 1,965?

20 A. Yes, sir.

21 Q. On what basis do you contend that
22 the rent for a 21,500 square foot space
23 would be comparable to these smaller
24 spaces?

25 A. This building could be configured

1 TENER

2 to accommodate all of those spaces.
3 Therefore, regardless of the overall size,
4 the economics of the retail in that
5 location drive the economic rent.

6 Q. I'm actually adding all of these
7 up now. Bear with me.

8 Combined, the square footage of
9 these eight rent comps is 15,717; is that
10 right? Or you can take my word for it,
11 it's 15,717. So you would actually need
12 all of these tenants and several more in
13 order to fill up the building you're
14 proposing on this site; right?

15 A. Yes, sir.

16 Q. Okay. And what is the term in
17 years of these proposed rent comps?

18 A. Seven to 15 years.

19 Q. But you're proposing for 20
20 years; right?

21 A. That's the defined term for this.

22 Q. But none of these comps are 20
23 years; right?

24 A. Okay.

25 Q. Is that right?

1 TENER

2 A. Yes, sir.

3 Q. I guess going back to a question
4 that I was asking before, wouldn't you
5 have to account -- so it seems like you
6 would have to build this building and have
7 multiple tenants, at least according to
8 the data that you provided and used as
9 comps. Wouldn't you need to get a number
10 of tenants and split up the space in order
11 to make it comparable to what you're
12 suggesting can be done here?

13 A. You feasibly could tenant this
14 with anywhere from one to 10 tenants if
15 need be. That's the basis of the economic
16 rents that this could -- this site, this
17 development could accommodate any number
18 of tenant installations.

19 Q. And if you had multiple tenants,
20 then you would have lease up and lease
21 down time; right?

22 A. Again we're solving for this to
23 be leased to a single tenant, not whether
24 they occupy it or not, a single tenant.

25 Q. Okay. But you're not -- what

1 TENER

2 demand is there in this area for a 21,500
3 square foot retail space?

4 A. There is demand for a variety of
5 commercial sizes in this area.

6 Q. And what did you do to verify
7 that?

8 A. I looked at comparable data. I
9 looked at listings in the area. There are
10 obviously larger retail tenants west of
11 us, closer to Barclay Center that are
12 significantly larger. There is evidence
13 of retail tenancy in a wide degree of
14 sizes.

15 Q. Isn't there a spot -- isn't there
16 retail space of about this same size
17 directly across the street that's been
18 empty for years?

19 A. Which building are you talking
20 about, sir?

21 Q. Right across the street. I don't
22 know the address.

23 A. I'd have to look at it again.

24 Q. Is that something you would have
25 looked at in your analysis?

1 TENER

2 A. I don't know if I looked at how
3 long the space was available. I was
4 primarily looking for lease transactions,
5 not space that was on the market for any
6 particular period of time.

7 Q. Now, let's look at the other tab
8 of that spreadsheet. It's got nine more
9 rent comps ranging in size from 720 square
10 feet to 2,050 square feet. Where did this
11 data come from?

12 A. Looks like it says 137 Atlantic
13 Avenue. May have come from another KTR
14 appraisal.

15 Q. Okay. Of all the properties --
16 so we're looking at 17 buildings, 17
17 properties. Are any of these low-cost
18 class D construction?

19 A. I don't think so.

20 Q. Okay. Wouldn't that impact what
21 someone would be willing to pay?

22 A. Again, I don't think it really
23 matters. I think the location, the
24 exposure is what drives it, not the box
25 that it's in.

1 TENER

2 Q. So someone would pay the same for
3 class A retail space as they would pay for
4 class D in the same location, is that your
5 testimony?

6 A. I see single story retail of very
7 low quality aged retail, not trading for
8 any different than newer. It's largely
9 driven based on the exposure and location
10 of the property, not the quality of the
11 box as stated over and over.

12 MR. WALSH: So if we could mark
13 VA 000848.

14 VERITEXT CONCIERGE: This will be
15 introduced as Exhibit P86.

16 (Exhibit P86, document Bates
17 labeled VA 000848, marked for
18 identification.)

19 BY MR. WALSH:

20 Q. Okay, if you could open up P86
21 when it's available and let me know when
22 it's available.

23 A. It's open.

24 Q. Okay. So Vanderbilt forwarded
25 you retail rent comps because you had

1 TENER

2 asked them a day earlier to provide you
3 with the information that supported their
4 hundred dollars per square foot range they
5 shared with you at the June 19, 2019
6 meeting. You then forwarded this
7 information to Shaun and you asked him or
8 Rebecca to confirm the comps. If you
9 could turn to the page ending in 852 and
10 you're going to need to rotate it.

11 A. Okay.

12 Q. So this is a list of recent lease
13 transactions; right?

14 A. It's a list of transactions from
15 comps, I think CompStak, I can't tell.
16 From January of 2019, mostly 2016 and all
17 the way through November of '17.

18 Q. Okay. Is this the type of data
19 that you would be looking at in trying to
20 arrive at retail rent comps?

21 A. This would be potential things
22 that you would look at to see if they're
23 applicable to your property. Some of
24 these look like they are certainly not
25 comparable.

1 TENER

2 Q. So what about 485 Atlantic
3 Avenue, it's the first one on the list.
4 It's two blocks from the Barclay Center.
5 It's on the same street. I know it's many
6 blocks away, it's on the other side of the
7 Barclay Center. But that in December 2017
8 rented out for \$46 per square foot. Why
9 is that not a comp?

10 A. It's an office/retail use for a
11 one and a half-year term. It would not be
12 considered a comp at all.

13 Q. How about 1010 Dean Street? It's
14 a first floor. In your sales comp
15 analysis you looked at -- only a handful
16 of land sales comps was a block away on
17 Dean Street. 1010 Dean Street, July 2016,
18 \$30 per square foot. Did you consider
19 that?

20 A. I don't know whether we did or
21 not. I would have to look at what -- it
22 says Brooklyn Warehouse LLC was the
23 tenant. Certainly they -- a lease of that
24 economics is not consistent. Most of the
25 data that I have -- I understand. So

1 TENER

2 looking at this, I can't tell what we knew
3 about it, what we looked at. It certainly
4 doesn't appear to be consistent with the
5 comparable data that we were aware of,
6 that we confirmed.

7 Q. But they sent this to you and you
8 asked your associate to look into it.

9 A. This is what you would consider a
10 data dump. I don't know if they sent a
11 bunch of things. Not every transaction is
12 a comparable that's relevant.

13 Q. I'm not suggesting that. I'm
14 just trying to understand what you did.
15 The other thing is when you look at 1010
16 Dean Street, it says Brooklyn warehouse.
17 When you pull it up that's a warehouse.
18 Isn't that your sort of perfect low-cost
19 class D construction, a warehouse?

20 A. A warehouse is a warehouse, not
21 retail. Again, what I asked at the
22 beginning of this was can you or Rebecca
23 confirm these comps, at least the ones
24 that are applicable to 840 Atlantic? It's
25 the job of the appraiser to determine

1 TENER

2 what's applicable and what's not. I can't
3 go through each of these without doing
4 research, pulling it up and answering your
5 questions, why we didn't include them or
6 why some work or wouldn't work. The most
7 comparable were included, analyzed and
8 formed my conclusion.

9 Q. Okay. So you don't think it has
10 anything to do with the fact that these
11 weren't in the price range you were
12 looking for?

13 A. I know that it doesn't have
14 anything to do with that.

15 Q. How do you know that?

16 A. Because that's not how I do
17 research and that's not how my staff does
18 research. We weren't geared towards
19 trying to prove it, prove a number. We
20 were analyzing comparables that we thought
21 were the most locationally similar, had
22 the same attributes, to try to inform our
23 opinion based on our knowledge of this
24 location of what the economics of retail
25 at that location would derive. We choose

1 TENER

2 and filter the most applicable, analyze
3 the most applicable and conclude to our
4 opinion of market rent.

5 Q. But you didn't ask Vanderbilt to
6 send you their comps, you asked them to
7 send you their comps in the hundred
8 dollars per square foot range; right?

9 MR. KOH: Objection.

10 THE WITNESS: That was relative
11 to their assertion or their
12 communication during the meeting of
13 June where they said we have knowledge
14 of comparables, and they used the word
15 comparables not always the same way
16 that an appraiser uses comparables.
17 People think a transaction is a
18 comparable. Transactions are
19 transactions. An appraiser determines
20 whether it is comparable to the
21 subject. Lots of times clients will
22 just send you things and you have to
23 determine whether they are comparable.
24 That conversation was such that they
25 believed that they had knowledge of

1 TENER

2 these transactions that were in excess
3 of a hundred collars a foot. My
4 challenge to them was if that's what
5 you have knowledge of, send it to us,
6 we'll consider it if it's comparable.

7 BY MR. WALSH:

8 Q. Okay, but I'm a lay person, I'm
9 not an appraiser, but there is a lot of
10 information they sent you and that's in
11 your files that suggest that the 90 to
12 \$100 per square foot range that you assume
13 is not a universal retail rent. And I'm
14 just trying to understand why those lower
15 rents weren't considered and what, if
16 anything, you did to make sure those were
17 not applicable.

18 A. What I had is I had my staff
19 confirm the comparables they could,
20 compare them, look at the properties
21 relative to us, filter out the ones that
22 we considered were relevant, that's the
23 process that you go through. You don't
24 just take a number on the surface and say
25 that's comparable. You have to look at

1 TENER

2 it. Like you said, that other property
3 was a warehouse. We would have thrown
4 that out immediately. The one and a half
5 year lease that was office retail, we
6 would have thrown that out immediately.
7 Gone through two, and that process would
8 have continued through any ones that we
9 thought locationally had a bearing on the
10 subject.

11 Q. But the 1010 Dean Street is a
12 block away from the land sales comp that
13 you used so how is it locationally
14 different? It's a block away.

15 A. On what type of zoning was that?

16 Q. You're the appraiser, you tell
17 me.

18 A. I don't have it in front of me.
19 Can I go back to it?

20 Q. It's P73.

21 A. What is P73?

22 Q. It's the spreadsheet.

23 A. I'm looking.

24 Q. It was an M1-1 site.

25 MR. KOH: I'm sorry, you're

1 TENER

2 looking at P73 now?

3 MR. WALSH: P73. One of his
4 comps for M1-1 sites was at 901 Dean
5 Street. I'm trying to understand why
6 rent comp a block away --

7 THE WITNESS: Which is 901 Dean
8 Street?

9 BY MR. WALSH:

10 Q. It's number 3.

11 A. An M1.

12 Q. Yes.

13 A. Versus M1 Crown.

14 MR. KOH: What tab are you on on
15 73?

16 MR. WALSH: Land sale grid and
17 1-1.

18 THE WITNESS: Do you mind if I
19 look at the location of 901 Dean
20 versus what was the other one?

21 BY MR. WALSH:

22 Q. Well, look, you didn't take -- it
23 was a zero percent adjustment for
24 location.

25 A. But I want to look at the comp

1 TENER

2 that you're concerned about, the 10 -- or
3 the lease transaction that you're
4 concerned about, the 1010 Dean.

5 Q. 1010 Dean Street.

6 A. I would like to see where that
7 is. What matters is physically what that
8 property, how it sits on the street. Is
9 it the same kind of frontage, what is it?

10 Q. Let's move on.

11 When you sent the July 30, 2019
12 report that concluded the same value,
13 Vanderbilt already knew it was going to
14 have the same value, right, you had
15 already told them?

16 A. What date?

17 Q. July 30, 2019.

18 A. I don't know if I reported ahead
19 of time. It's possible that before I
20 finished writing the report I might have
21 told them but I don't recall.

22 Q. You said you were surprised that
23 the numbers worked out. Were they
24 surprised?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: I don't know if
3 they were surprised or not.

4 BY MR. WALSH:

5 Q. What was their reaction?

6 A. I don't recall.

7 MR. WALSH: If we can mark
8 VA 001773.

9 (Exhibit P87, document Bates
10 labeled VA 001773, marked for
11 identification.)

12 VERITEXT CONCIERGE:
13 VA 001773-75?

14 MR. WALSH: Yes.

15 VERITEXT CONCIERGE: Just wanted
16 to make sure. This will be introduced
17 as Exhibit P87.

18 BY MR. WALSH:

19 Q. So this is an e-mail that you
20 sent to Sam Rottenberg and Morris Missry
21 on September 4, 2019. You attached a
22 redlined Word document which is why it
23 doesn't have a Bates number on it but it
24 was attached sequentially. Sam Rottenberg
25 had sent you a letter a day earlier. It

1 TENER

2 was a draft agreement that McDonald's had
3 sent to Vanderbilt and you made some
4 suggested edits and sent them back to
5 McDonald's.

6 Do you see that?

7 A. Yes, sir.

8 Q. Do you recall that?

9 A. I recall reviewing this and I do
10 recall making some markups and sending
11 them back.

12 Q. So one of the edits you proposed
13 making is in bullet point 1 where you
14 recommended striking language that would
15 have the appraisers estimate the value of
16 the property as encumbered by the lease.

17 Do you see that?

18 A. Yes, sir.

19 Q. But you on July 30th had issued a
20 report that purportedly estimated the
21 value of the property as encumbered by the
22 lease; right?

23 A. Yes, at least considering the
24 lease term, yes.

25 Q. So why were you concerned and why

1 TENER

2 did you suggest striking that requirement
3 that the parties be directed to have their
4 appraisers estimate the value as
5 encumbered by the lease?

6 MR. KOH: Objection.

7 THE WITNESS: Because this -- I
8 believe I had an e-mail associated
9 with this. If I recall correctly, I
10 was concerned that this would be
11 tantamount to modifying the lease and
12 I think that the phrase encumbered as
13 encumbered by the lease may have had
14 more far-reaching effects than just
15 taking into consideration the lease
16 term.

17 BY MR. WALSH:

18 Q. Well, but Morris Missry had told
19 you on April 1, 2019 to ignore the
20 encumbrance to the lease; right?

21 A. You're using the word encumbrance
22 now. It's taking into account the lease
23 term.

24 Q. Okay.

25 A. So that's really the concern is

1 TENER

2 that does this phrasing speak to more than
3 just the ruling of the Second Avenue and
4 that sort of just was my concern is that
5 they should be careful in terms of going
6 beyond what the Second Avenue ruling
7 requires of them.

8 Q. But Morris had told you in April,
9 he had given you the instructions on April
10 1st that we went through for that 936
11 Second Avenue, and isn't it true you were
12 just trying to protect his position here?

13 A. I don't understand that question.

14 Q. So in April, on April 1st, Morris
15 told you not to consider the rule
16 announced in 936 Second Avenue; right?

17 A. Correct.

18 Q. You had asked him about that and
19 wouldn't you agree that that is basically
20 what Mike Meyer was trying to capture in
21 his draft agreement that you struck the
22 language from?

23 MR. KOH: Objection.

24 THE WITNESS: My concern is that
25 McDonald's might have been trying to

1 TENER

2 go beyond that. I don't know whether
3 they were trying to capture that or
4 trying to amend the lease agreement.
5 That was my concern was that they
6 might be trying to go beyond that.

7 BY MR. WALSH:

8 Q. But weren't you trying to protect
9 Morris's position that he staked out in
10 April?

11 A. No, I was trying to have them
12 avoid modifying their lease to go beyond
13 the ruling of Second Avenue.

14 MR. WALSH: Okay. If we could
15 pull up VA 001776.

16 (Exhibit P88, document Bates
17 labeled VA 001776, marked for
18 identification.)

19 VERITEXT CONCIERGE: This will be
20 marked as Exhibit P88.

21 BY MR. WALSH:

22 Q. This is a series of e-mails
23 including an e-mail that you sent on
24 September 4, 2019 to what appears to be
25 Morris Missry and Sam Rottenberg.

1 TENER

2 Do you see that? And Morris
3 asked you why you deleted that language.
4 And you responded, "I was trying to
5 protect your position that the lease is
6 not to be considered unless it is
7 specifically stated in the lease. If you
8 want to argue this point, an agreement in
9 this letter might eliminate your position.
10 That said, I do believe that they may
11 prevail in their interpretation of the
12 lease under the concept of that which is
13 not specifically excluded is included in
14 the court decision that I previously sent
15 you."

16 And that court decision that you
17 previously sent him was 936 Second Avenue;
18 right?

19 A. Yes, sir.

20 Q. And notwithstanding the fact that
21 you had now given them a report that
22 purportedly took into account the 20-year
23 lease term, you still wanted to protect
24 that position; isn't that right?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: That's what this
3 states. My recollection was more
4 consistent with what you told you
5 before but I can't -- I can't disagree
6 with what I wrote here so my
7 recollection when I testified a few
8 seconds ago is what I thought that was
9 intended to do. I still believe that
10 this only talks about pieces that I
11 was concerned that they would be
12 modifying the lease. I still think
13 that was a concern but it's definitely
14 not communicated here, sir.

15 BY MR. WALSH:

16 Q. Appraisers must be unbiased;
17 right?

18 A. Yes, sir.

19 Q. And appraisers are not advocates
20 for their client; right?

21 A. Correct, sir.

22 Q. Okay. And appraisals are
23 supposed to be based upon market evidence
24 and not formulated to the advancement of
25 the client's objective; right?

1 TENER

2 A. Yes, sir.

3 Q. So why were you trying to protect
4 Vanderbilt's position?

5 A. This has nothing to do with the
6 appraisal. This has to do with an
7 agreement that they were going to have to
8 exchange reports. I believe that's what
9 that letter was.

10 Q. Well, then, why were they asking
11 you to edit it if it had nothing to do
12 with the appraisal?

13 MR. KOH: Objection.

14 THE WITNESS: Because it had to
15 do with the provisions under which the
16 reports would be exchanged. They were
17 leaving the wording of the -- or
18 altering the wording of the option
19 agreement that directs appraisers so
20 that would be the reason I guess that
21 they asked. I don't know why they
22 asked me, I just responded to them.

23 BY MR. WALSH:

24 Q. And you responded and made edits
25 to try to protect their position; right?

1 TENER

2 A. That's what this states.

3 MR. KOH: Objection. Go ahead.

4 THE WITNESS: That's what this
5 states.

6 BY MR. WALSH:

7 Q. And those are your words; right?

8 A. Yes, sir.

9 Q. And you had testified earlier
10 that you actually thought the case should
11 apply; right?

12 A. I still think the case applies.

13 Q. Right. And even here you say
14 that you think McDonald's has the better
15 position; right?

16 MR. KOH: Objection.

17 THE WITNESS: I think that the
18 case applies. I didn't know whether
19 they would argue this or not.

20 BY MR. WALSH:

21 Q. So if you thought the case
22 applied and if you're not an advocate and
23 you're not supposed to be biased, why are
24 you striking language to protect a
25 position that you think is wrong?

1 TENER

2 MR. KOH: Objection.

3 THE WITNESS: Sorry, sir, I
4 didn't hear that, Howard.

5 MR. KOH: I just made an
6 objection.

7 THE WITNESS: Can you repeat the
8 question?

9 BY MR. WALSH:

10 Q. If you thought the case applied
11 and if you're not an advocate and you're
12 not supposed to be biased, why are you
13 striking language to protect the position
14 that you thought was wrong?

15 MR. KOH: Same objection.

16 THE WITNESS: I wasn't defending
17 a position I thought was wrong. I was
18 giving them markups that I thought
19 might be altering the option
20 agreement, potentially.

21 MR. WALSH: If we could mark
22 VA 001833.

23 (Exhibit P89, document Bates
24 labeled VA 001833, marked for
25 identification.)

1 TENER

2 VERITEXT CONCIERGE: This will be
3 introduced as Exhibit P89.

4 BY MR. WALSH:

5 Q. If you could look at the top of
6 the third page, 1835, Mike Meyer wrote an
7 e-mail to Morris Missry that was then
8 forwarded to you. Mike sent Morris that
9 e-mail on October 8, 2019 and Mike wrote,
10 "Morris, sorry to have missed your call.
11 I'm in department meetings today -
12 Thursday. I reviewed Tom Tener's
13 restricted appraisal that he exchanged
14 with Sharon. We talked at the end of
15 August, and you agreed that the property
16 was to be valued as encumbered by the
17 lease and that you were instructing the
18 appraiser to redo his report to account
19 for the lease encumbrance." And then he
20 goes on to say that "it does not appear
21 that the report was redone as Morris had
22 indicated on his call."

23 And Morris forwarded this e-mail
24 to you; right?

25 A. Yes, sir.

1 TENER

2 Q. And he asked you to ghostwrite a
3 response to him; right?

4 A. Yes.

5 Q. As an appraiser, do you feel it's
6 your place to ghostwrite a response for a
7 lawyer?

8 A. I don't think that I should
9 ghostwrite legal responses. He was asking
10 me to respond relative to the -- whether
11 KTR revised the appraisal. What I
12 communicated was the facts that occurred
13 so that he could use them.

14 Q. And did Morris -- by the way, did
15 you speak with Morris about Mike's e-mail?

16 A. I don't recall.

17 Q. Do you recall if he ever denied
18 making that statement to Mike Meyer?

19 A. What statement?

20 Q. That Mike said in his e-mail, and
21 this is a quote from Mike's e-mail saying
22 what Morris had told him, quote, "We
23 talked at the end of August, and you
24 agreed that the property was to be valued
25 as encumbered by the lease and that you

1 TENER

2 were instructing the appraiser to redo his
3 report to account for the lease
4 encumbrance."

5 Did Morris ever deny to you that
6 he made that statement?

7 A. I don't know. I don't recall.

8 Q. Did he ever admit to making that
9 statement?

10 A. I don't recall.

11 Q. Okay. And then at the very top
12 after a little bit more back and forth,
13 Morris wrote to you on October 8th at
14 1:35 p.m., "I had many calls with him,"
15 referring to Mike, "but you did the
16 appraisal, bottom line, before we actually
17 signed that letter."

18 Do you agree with Morris that you
19 redid your appraisal in July?

20 A. Yes, sir. After we left that
21 June meeting, we agreed that I was
22 going -- it was going to be necessary for
23 me to redo the appraisal to incorporate
24 the residual approach. I couldn't start
25 on it right away. As you'll see in some

1 TENER

2 of the communications, I tell them when I
3 could get around to do it. My staff
4 started doing research just a few weeks
5 later and I finished it up in late July.
6 At that point, I viewed it as done and
7 ready to go forward and that my conclusion
8 reflected the 20-year lease term
9 encumbrance.

10 Q. Do you know why Morris or did
11 Morris ever tell you why he waited until
12 the end of August to communicate to
13 McDonald's that he had asked you to redo
14 your appraisal?

15 MR. KOH: Objection.

16 THE WITNESS: I don't know why or
17 what his timing was relative to
18 communications. I was -- I had
19 already received my direction to do it
20 and I had completed it by the end of
21 July.

22 MR. WALSH: Just two more very
23 quick things. If we could mark
24 VA 000420.

25 (Exhibit P90, document Bates

1 TENER

2 labeled VA 000420, marked for
3 identification.)

4 VERITEXT CONCIERGE: This will be
5 introduced as Exhibit P90.

6 BY MR. WALSH:

7 Q. Mr. Tener, this is a September 30
8 e-mail that you sent to Morris Missry and
9 Sam Rottenberg. And you appear to be --
10 actually can you tell me what this e-mail
11 reflects?

12 MR. KOH: I'm sorry, what number
13 is this? What exhibit number is this?

14 VERITEXT CONCIERGE: This is P90.

15 MR. KOH: Thank you.

16 THE WITNESS: It was a summation
17 of the meeting and exchange of our
18 revised reports.

19 BY MR. WALSH:

20 Q. And one of the things you wrote
21 is, "She also continues to identify the
22 term as a 5 year renewal."

23 Can you explain what concern you
24 were trying to express there?

25 MR. KOH: Objection.

1 TENER

2 THE WITNESS: She was stating
3 five-year term rather than the 20-year
4 term, the tenant renewal.

5 BY MR. WALSH:

6 Q. And where did she state that?

7 A. She stated it during our meeting
8 and I believe if I recall correctly in the
9 report but she definitely was
10 communicating that during our meeting.

11 Q. Now, earlier you explained that
12 you were -- for your August 2018 report
13 you assumed 99-year ground lease term and
14 you came up with a rent amount; right?

15 A. Yes.

16 Q. And then in July of the following
17 year, you were asked to come up with the
18 ground rent for a 20-year term and even
19 though -- and the rent was actually higher
20 for the 20-year term. I guess I'm trying
21 to understand how does the length of the
22 renewal period or the length of the lease
23 that she was considering, how does that
24 impact value and make her valuation
25 unreliable?

1 TENER

2 A. She's not considering all uses of
3 the property could be put by limiting it
4 to a five-year term. She is stuck with
5 the concept that this is a quick service
6 restaurant type of use similar to a
7 McDonald's and deriving comps from that
8 assumption, not that the site could be
9 used for anything more than a say 3,000
10 square foot retail with abundant parking
11 around it. That is not consistent with
12 the highest and best use and I think her
13 five-year presumptive term is biassing her
14 conclusion and her opinion.

15 MR. WALSH: Okay. This is the
16 last document, I think VA 000593.

17 (Exhibit P91, document Bates
18 labeled VA 000593, marked for
19 identification.)

20 MR. WALSH: It's some handwritten
21 notes.

22 VERITEXT CONCIERGE: I actually
23 don't have a 593. Oh, wait, I'm
24 sorry, there it is. Introducing now.
25 It will be known as Exhibit P91. It's

1 TENER

2 in there now.

3 MR. WALSH: Thank you.

4 THE WITNESS: Okay.

5 BY MR. WALSH:

6 Q. Do you recognize this
7 handwriting?

8 A. It's not mine.

9 Q. It came from your work file. I'm
10 just trying to understand what this
11 reflects. Do you know what this document
12 is?

13 A. I'm not sure. I think this might
14 be the original notes from Theresa Nygard
15 when she got a call about this but I'm not
16 certain.

17 Q. The notes seem to reference
18 somebody named Michael Greenbaum. Do you
19 have any idea who that is?

20 A. No. I think this might have been
21 in a call to Theresa Nygard and her notes
22 when she originally passed this on to me
23 as something that I might do. I think the
24 original call came in to her and because
25 she had a lot of experience in Brooklyn,

1 TENER

2 that most of her expertise was Manhattan
3 land, that she felt that she should turn
4 it over to me.

5 Q. I see. Okay, if I could just
6 have two minutes, I think I'm done. If we
7 could just go off the record for two
8 minutes.

9 MR. KOH: Okay.

10 THE VIDEOGRAPHER: Okay, thank
11 you. The time is 6:15. We're going
12 off the record.

13 (Recess taken from 6:15 p.m. to
14 6:17 p.m.)

15 THE VIDEOGRAPHER: The time is
16 approximately 6:18. We're back on the
17 record.

18 MR. WALSH: Thank you for your
19 time today, Mr. Tener. I don't have
20 any further questions at this time but
21 I reserve the right to ask some
22 follow-up questions based upon any
23 questions that Mr. Koh may ask.

24 MR. KOH: Thank you. And
25 Brendan, if you could refresh my

1 TENER

2 recollection as to which exhibit
3 number -- I think it's P36. So let's
4 bring up P36 and yes, I am right.

5 EXAMINATION

6 BY MR. KOH:

7 Q. And Mr. Tener, I would like to
8 direct your attention to the second -- to
9 the third page of that document which is
10 the second page of the report. It bears
11 Bates stamp number VA 001047. And I'd
12 like to direct your attention to the third
13 full paragraph, first sentence. I would
14 like you to read that to yourself and then
15 tell me when you're ready and I'll ask you
16 a question.

17 A. (Witness perusing document.)

18 The third full --

19 Q. Right. Begins the subject site
20 is a U-shaped.

21 A. I have the wrong page.

22 Q. It's on the same page --

23 A. I had the wrong page. That's
24 what made it difficult.

25 Yes, sir.

1 TENER

2 Q. Okay. So having read this
3 sentence, earlier you testified that you
4 believe that the M1-1 portion of the site
5 at 840 Atlantic Avenue was 22,500 square
6 feet. Does this sentence change your
7 answer in any way?

8 A. Yes, sir. The M1 portion is
9 22,000 square feet. There is a -- if I
10 recall there was a small sliver of about
11 5,000 square feet that I did not use for
12 the development footprint of the 21,500
13 square foot building. I only used the
14 portion that fronts on Atlantic and
15 Vanderbilt and it's an L-shaped site, not
16 the tail that comes down that has frontage
17 on Pacific.

18 MR. KOH: Thank you. I have no
19 more questions, Mr. Tener. Mr. Walsh,
20 do you have any follow-up based on --
21 that is within the scope of what I
22 just asked?

23 MR. WALSH: I have no further
24 questions.

25 MR. KOH: Okay. All right, then

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TENER

this deposition is concluded and thank
you for your time, Mr. Tener, thank
you, everybody. Cathi are you going
to send me a rough?

THE VIDEOGRAPHER: Can I just
close out the deposition?

MR. KOH: Yes, please.

THE VIDEOGRAPHER: Okay, thanks
everyone. We are off the record at
6:21 p.m. and this concludes today's
testimony given by Thomas J. Tener.
The total number of media units used
was 6 and will be retained by Veritext
New York. Thanks, everyone.

(Time noted: 6:21 p.m.)

THOMAS J. TENER

Subscribed and sworn to before me
this ____ day of _____, 20__.

Notary Public

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C E R T I F I C A T E

STATE OF NEW YORK)
 : ss.
COUNTY OF NASSAU)

I, CATHI IRISH, a Registered
Professional Reporter, Certified Realtime
Reporter, and Notary Public within and for
the State of New York, do hereby certify:

That THOMAS J. TENER, the witness
whose deposition is hereinbefore set
forth, was duly sworn by me and that such
deposition is a true record of the
testimony given by the witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I am
in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 22nd day of September,
2021.


<%5027 Signature%>

CATHI IRISH, RPR, CRR, CLVS

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----- I N D E X -----

WITNESS	EXAMINATION BY	PAGE
THOMAS J. TENER	MR. WALSH	6
	MR. KOH	334

----- EXHIBITS -----

EXHIBIT NUMBER	DESCRIPTION	PAGE
Exhibit P66,	document Bates labeled	10
VA 001059		
Exhibit P67,	document Bates labeled	45
VA 023239		
Exhibit P68,	document entitled The	60
Appraisal of Real Estate		
Exhibit P69,	document Bates labeled	79
VA 000313		
Exhibit P70,	document Bates labeled	117
VA 000587		
Exhibit P71,	document Bates labeled	118
VA 000664		
Exhibit P72,	document Bates labeled	121
VA 001506		
Exhibit P73,	document Bates labeled	139
VA 000117		

1		
2	Exhibit P74, document Bates labeled	190
3	VA 001592	
4	Exhibit P75, document Bates labeled	199
5	MCD002701	
6	Exhibit P76, document Bates labeled	201
7	VA 000408	
8	Exhibit P77, document Bates labeled	203
9	VA 001248	
10	Exhibit P78, document Bates labeled	234
11	VA 017997	
12	Exhibit P79, document entitled The	241
13	Appraisal of Real Estate	
14	Exhibit P80, document Bates labeled	246
15	VA 001083	
16	Exhibit P81, document Bates labeled	254
17	VA 001061	
18	Exhibit P82, document Bates labeled	255
19	VA 001039	
20	Exhibit P83, document Bates labeled	268
21	VA 000959	
22	Exhibit P84, document entitled	275
23	Marshall Valuation Service	
24	Exhibit P85, document Bates labeled	299
25	VA 002153	

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VA 001833	
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VA 000420	
Exhibit P91, document Bates labeled	331
VA 000593	

1 ** ERRATA SHEET **

2 CASE: MCDONALD'S vs. VANDERBILT

 DEPOSITION DATE: 9/21/2021

3 DEPONENT: THOMAS J. TENER

4 PAGE LINE(S) CHANGE REASON

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 THOMAS J. TENER

22

 SUBSCRIBED AND SWORN TO BEFORE ME

23 THIS DAY OF , 20____.

24

25 _____
(NOTARY PUBLIC)

MY COMMISSION EXPIRES:

[& - 19]

Page 1

&	001592 190:23,25 339:3	1,255,571 281:2 1,310,600 259:6	11:00 44:18 11:34 41:18
& 3:11 5:18 164:8 184:19 275:5,18 275:19 276:20	001773 315:8,10 340:5	1,348,000 126:18 127:13 259:10 297:6	12,000 252:10 121 338:22 125 3:13 128 67:3
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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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